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10 Attorneys for Defendant and Counterclaimant
11 UNITED NATIONAL INSURANCE COMPANY

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO/OAKLAND DIVISION

15 INTERSTATE FIRE & CASUALTY
16 COMPANY,

17 Plaintiff,

18 v.

19 UNITED NATIONAL INSURANCE
20 COMPANY and DOES 1 through 10.

21 Defendants

22 UNITED NATIONAL INSURANCE
23 COMPANY,

24 Cross-complainant,

25 v.

26 INTERSTATE FIRE & CASUALTY
27 COMPANY and Roes 1 through 10,

28 Cross-defendants.

Action No.: C 07-04943 MHP

DECLARATION OF THOMAS H. NIENOW
IN SUPPORT OF UNITED NATIONAL'S
MOTION FOR LEAVE TO AMEND
COUNTERCLAIM.

Date: August 18, 2008

Time: 2:00 p.m.

Courtroom 15

HONORABLE MARILYN HALL PATEL

1 I, Thomas H. Nienow, declare as follows:

2 1. I am an attorney admitted to practice before this Court and I am of counsel
3 to Nielsen, Haley & Abbott LLP, counsel of record for defendant and counterclaimant
4 United National Insurance Company in this action. The following facts are based upon
5 my personal knowledge and I would competently testify to them if called as a witness.

6 2. A true and correct copy of United National's answer and counterclaim filed
7 in this action on October 1, 2007, is attached hereto as Exhibit 1.

8 3. True and correct copies of documents bearing Bates numbers IFC000450,
9 IFC00452-457, and IFC 00459, disclosed by plaintiff and counterdefendant Interstate Fire
10 & Casualty Company to United National after it filed its answer and counterclaim, are
11 attached hereto as Exhibit 2.

12 4. True and correct copies of documents bearing Bates numbers IFC00451 and
13 IFC00458, disclosed by Interstate to United National after United National filed its
14 answer and counterclaim, are attached hereto as Exhibit 3.

15 5. A true and correct copy of my letter to Interstate's counsel dated May 4,
16 2008, conveying United Nationals' supplemental Rule 26(a) disclosure is attached hereto
17 as Exhibit 4.

18 6. A true and correct copy of my letter to Interstate's counsel dated June 2,
19 2008, conveying Interstate's initial proposed amended answer and counterclaim, and a
20 stipulation for its filing, is attached hereto as Exhibit 5.

21 7. A true and correct copy of an e-mail from counsel for Interstate to me dated
22 June 4, 2008, and my responsive e-mail dated June 5, 2008, is attached hereto as Exhibit
23 6.

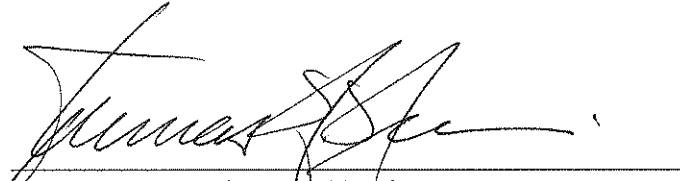
24 8. A true and correct copy of the version of United National's amended answer
25 and counterclaim that I sent to Interstate's counsel on June 4, 2008, and which United
26 National now seeks leave to file, is attached hereto as Exhibit 7.

27 9. On June 11, 2008, I spoke by telephone with Interstate's counsel,
28 Christopher Borders, in follow up to my June 5, 2008, e-mail. I asked Borders whether he

1 would stipulate to the filing of United National's amended answer and counterclaim, but
2 he said that he would not.

3 I declare under penalty of perjury under the laws of the United States that the
4 foregoing is true and correct. Executed June 20, 2008, at San Francisco, California.

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Thomas H. Nienow

Exhibit 1

1 JAMES C. NIELSEN (111889)
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10 Attorneys for Defendant and Counterclaimant
11 UNITED NATIONAL INSURANCE COMPANY

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO/OAKLAND DIVISION

15 FIREMAN'S FUND INSURANCE
16 COMPANY,

17 Plaintiff,

18 v.

19 UNITED NATIONAL INSURANCE
20 COMPANY and DOES 1 through 10.

21 Defendants.

22 UNITED NATIONAL INSURANCE
23 COMPANY, a Pennsylvania corporation,

24 Cross-complainant,

25 v.

26 FIREMAN'S FUND INSURANCE
27 COMPANY, a California corporation,
28 INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation, and
Roes 1 through 10, inclusive,

Cross-defendants.

Action No.: C 07-04943 JL

ANSWER AND COUNTERCLAIM OF
UNITED NATIONAL INSURANCE
COMPANY.

DEMAND FOR JURY TRIAL.

ANSWER TO COMPLAINT

Defendant United National Insurance Company, in answer to the complaint filed by plaintiff Fireman's Fund Insurance Company, admits, denies, and alleges as follows:

1. Responding to the allegations in paragraph 1 of the complaint, United National admits and alleges that plaintiff makes the contentions set forth in paragraph 1 of the complaint. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 1 of the complaint.

2. Responding to the allegations in paragraph 2 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

3. Responding to the allegations in paragraph 3 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 3 of the complaint.

4. Responding to the allegations contained in paragraph 4 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

5. Responding to the allegations in paragraph 5 of the complaint, United National admits and alleges that it is a Pennsylvania corporation and that it is authorized to and sells insurance policies on a surplus-lines basis in the State of California. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 5 of the complaint.

6. Responding to the allegations in paragraph 6 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 6 of the complaint.

7. Responding to the allegations contained in paragraph 7 of the complaint, United National admits and alleges that it issued to named insured Cirrus Medical Staffing LLC, a policy of claims-made-and-reported professional liability insurance effective from January 27, 2006, to

1 January 26, 2007, with policy number AH-0000267 (the "United National policy") and that the
2 United National policy sets forth to various terms, conditions, exclusions, and dollar limits of
3 liability, all of which speak for themselves. Except as so admitted and alleged, United National
4 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
5 every, and all of the allegations contained in paragraph 7 of the complaint.

6 8. Responding to the allegations in paragraph 8 of the complaint, United National is
7 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*
8 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in
9 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number
10 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted
11 and alleged, United National lacks sufficient knowledge, information or belief to respond to and
12 on that basis denies each, every, and all of the allegations contained in paragraph 8 of the
13 complaint.

14 9. Responding to the allegations in paragraph 9 of the complaint, United National is
15 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*
16 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in
17 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number
18 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted
19 and alleged, United National lacks sufficient knowledge, information or belief to respond to and
20 on that basis denies each, every, and all of the allegations contained in paragraph 9 of the
21 complaint.

22 10. Responding to the allegations in paragraph 10 of the complaint, United National is
23 informed and believes and on that basis admits and alleges that a lawsuit styled *Tracy v. Lovelace*
24 *Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in the State of
25 New Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005
26 07009, the documents of which speak for themselves. Except as so admitted and alleged, United
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
28 each, every, and all of the allegations contained in paragraph 10 of the complaint.

1 11. Responding to the allegations in paragraph 11 of the complaint, United National is
2 informed and believes, and on that basis admits and alleges, that Interstate Fire & Casualty
3 Company defended Cirrus Medical Services LLC in the *Tracy* action. Except as so admitted and
4 alleged, United National lacks sufficient knowledge, information or belief to respond to and on
5 that basis denies each, every, and all of the allegations contained in paragraph 11 of the
6 complaint.

7 12. Responding to the allegations in paragraph 12 of the complaint, United National
8 admits and alleges that it received notice of the *Tracy* action and that United National issued a
9 letter dated October 6, 2006, which speaks for itself, advising that United National would not
10 defend Cirrus in the *Tracy* action, and reserving United National's rights to disclaim coverage for
11 the *Tracy* action under the United National policy. Except as so admitted and alleged, United
12 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
13 each, every, and all of the allegations contained in paragraph 12 of the complaint.

14 13. Responding to the allegations in paragraph 13 of the complaint, United National
15 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
16 every, and all of the allegations contained in paragraph 13 of the complaint.

17 14. Responding to the allegations in paragraph 14 of the complaint, United National
18 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself, advising
19 that United National had determined that there was no coverage under the United National policy
20 for the *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a
21 claim first made and reported during Interstate Fire & Casualty Company's immediately
22 preceding policy period, and stating that United National continued to reserve all of its rights
23 under the policy. Except as so admitted and alleged, United National lacks sufficient knowledge,
24 information or belief to respond to and on that basis denies each, every, and all of the allegations
25 contained in paragraph 14 of the complaint.

26 15. Responding to the allegations contained in paragraph 15 of the complaint, United
27 National lacks sufficient knowledge, information or belief to respond and on that basis denies
28 each, every, and all of the allegations contained in paragraph 15 of the complaint.

1 16. Responding to the allegations in paragraph 16 of the complaint, United National
2 admits and alleges that the United National policy includes, without the added italics, the policy
3 language quoted in paragraph 16. Except as so admitted and alleged, United National lacks
4 sufficient knowledge, information or belief to respond to and on that basis denies each, every, and
5 all of the allegations contained in paragraph 16 of the complaint.

6 17. Responding to the allegations in paragraph 17 of the complaint, United National
7 denies each, every, and all of the allegations contained in paragraph 17 of the complaint.

8 18. Responding to the allegations in paragraph 18 of the complaint, United National
9 admits and alleges that the United National policy speaks for itself. Except as so admitted and
10 alleged, United National lacks sufficient knowledge, information or belief to respond to and on
11 that basis denies each, every, and all of the allegations contained in paragraph 18 of the
12 complaint.

13 19. Responding to the allegations in paragraph 19 of the complaint, United National
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
15 and all of the allegations contained in paragraph 19 of the complaint.

16 20. Responding to the allegations in paragraph 20 of the complaint, United National
17 admits and alleges that the United National policy, which speaks for itself, includes the policy
18 language quoted in paragraph 20, although the quoted language is set forth in a larger paragraph
19 that has been omitted from paragraph 20. Except as so admitted and alleged, United National
20 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
21 every, and all of the allegations contained in paragraph 20 of the complaint.

22 21. Responding to the allegations in paragraph 21 of the complaint, United National
23 admits and alleges that the United National policy, which speaks for itself, includes the policy
24 language quoted in paragraph 21, although the quoted language is set forth in a larger paragraph
25 that has been omitted from paragraph 21. Except as so admitted and alleged, United National
26 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
27 every, and all of the allegations contained in paragraph 21 of the complaint.

28 22. Responding to the allegations in paragraph 22 of the complaint, United National

1 admits and alleges that the United National policy speaks for itself. Except as so admitted and
2 alleged, United National denies each, every, and all of the allegations contained in paragraph 22
3 of the complaint.

4 23. Responding to the allegations in paragraph 23 of the complaint, United National
5 denies each, every, and all of the allegations contained in paragraph 23 of the complaint.

6 24. Responding to the allegations in paragraph 24 of the complaint, United National
7 denies each, every, and all of the allegations contained in paragraph 24 of the complaint.

8 25. Responding to the allegations in paragraph 25 of the complaint, United National
9 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
10 and all of the allegations contained in paragraph 25 of the complaint.

11 26. Responding to the allegations in paragraph 26 of the complaint, United National
12 admits and alleges that it contributed \$100,000 on behalf of Cirrus to settle the *Tracy* action.
13 Except as so admitted and alleged, United National lacks sufficient knowledge, information or
14 belief to respond and on that basis denies each, every, and all of the allegations contained in
15 paragraph 26 of the complaint.

16 27. Responding to the allegations in paragraph 27 of the complaint, United National
17 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
18 and all of the allegations contained in paragraph 27 of the complaint.

19 28. Responding to the allegations in paragraph 28 of the complaint, United National
20 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

21 29. Responding to the allegations in paragraph 29 of the complaint, United National
22 admits and alleges that Fireman's Fund contends that United National had a duty to defend
23 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse
24 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United
25 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United
26 National contends that it has no obligation to reimburse Fireman's Fund of Interstate for any of
27 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United
28 National lacks sufficient knowledge, information or belief to respond to and on that basis denies

1 each, every, and all of the allegations contained in paragraph 29 of the complaint.

2 30. Responding to the allegations in paragraph 30 of the complaint, United National
3 admits and alleges that Fireman's Fund contends that United National had a duty to defend
4 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse
5 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United
6 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United
7 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of
8 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United
9 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
10 each, every, and all of the allegations contained in paragraph 30 of the complaint.

11 31. Responding to the allegations in paragraph 31 of the complaint, United National
12 admits and alleges that Fireman's Fund contends that United National had a duty to defend
13 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse
14 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United
15 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United
16 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of
17 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United
18 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
19 each, every, and all of the allegations contained in paragraph 31 of the complaint.

20 32. Responding to the allegations in paragraph 32 of the complaint, United National
21 admits and alleges that Fireman's Fund contends that United National had a duty to defend
22 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse
23 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United
24 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United
25 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of
26 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
28 each, every, and all of the allegations contained in paragraph 32 of the complaint.

1 33. Responding to the allegations in paragraph 33 of the complaint, United National
2 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

3 34. Responding to the allegations in paragraph 34 of the complaint, United National
4 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
5 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
6 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
7 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
8 the *Tracy* action, and that United National contends that it has no obligation to reimburse
9 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to
10 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
11 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
12 each, every, and all of the allegations contained in paragraph 34 of the complaint.

13 35. Responding to the allegations in paragraph 35 of the complaint, United National
14 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
15 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
16 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
17 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
18 the *Tracy* action, and that United National contends that it has no obligation to reimburse
19 Fireman's Fund or Interstate for all or part of any payment by Fireman's' Fund or Interstate to
20 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
21 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
22 each, every, and all of the allegations contained in paragraph 35 of the complaint.

23 36. Responding to the allegations in paragraph 36 of the complaint, United National
24 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
25 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
26 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
27 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
28 the *Tracy* action, and that United National contends that it has no obligation to reimburse

1 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to
2 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
3 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
4 each, every, and all of the allegations contained in paragraph 36 of the complaint.

5 37. Responding to the allegations in paragraph 37 of the complaint, United National
6 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
7 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
8 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
9 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
10 the *Tracy* action, and that United National contends that it has no obligation to reimburse
11 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to
12 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
13 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
14 each, every, and all of the allegations contained in paragraph 37 of the complaint.

15 38. Responding to the allegations in paragraph 38 of the complaint, United National
16 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

17 39. Responding to the allegations in paragraph 39 of the complaint, United National
18 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
19 and all of the allegations contained in paragraph 39 of the complaint.

20 40. Responding to the allegations in paragraph 40 of the complaint, United National
21 admits and alleges that it issued to Cirrus as named insured a policy of claims-made-and-reported
22 professional liability insurance referenced in paragraph 7 of this answer. Except as so admitted
23 and alleged, United National lacks sufficient knowledge, information or belief to respond to and
24 on that basis denies each, every, and all of the allegations contained in paragraph 40 of the
25 complaint.

26 41. Responding to the allegations in paragraph 41 of the complaint, United National
27 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,
28 advising that United National had determined that there was no coverage under the Untied

1 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to
2 constitute a claim first made and reported during Interstate Fire & Casualty Company's
3 immediately preceding policy period, and stating that United National continued to reserve all
4 of its rights under the policy. Except as so admitted and alleged, United National lacks
5 sufficient knowledge, information or belief to respond to and on that basis denies each, every,
6 and all of the allegations contained in paragraph 41 of the complaint.

7 42. Responding to the allegations in paragraph 42 of the complaint, United National
8 denies each, every, and all of the allegations contained in paragraph 42 of the complaint.

9 43. Responding to the allegations in paragraph 43 of the complaint, United National
10 denies each, every, and all of the allegations contained in paragraph 43 of the complaint.

11 44. Responding to the allegations in paragraph 44 of the complaint, United National
12 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

13 45. Responding to the allegations in paragraph 45 of the complaint, United National
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each,
15 every, and all of the allegations contained in paragraph 45 of the complaint.

16 46. Responding to the allegations contained in paragraph 46 of the complaint, United
17 National admits and alleges that it issued to Cirrus as named insured a policy of claims-made-
18 and-reported professional liability insurance referenced in paragraph 7 of this answer. Except as
19 so admitted and alleged, United National lacks sufficient knowledge, information or belief to
20 respond to and on that basis denies each, every, and all of the allegations contained in paragraph
21 46 of the complaint.

22 47. Responding to the allegations in paragraph 47 of the complaint, United National
23 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,
24 advising that United National had determined that there was no coverage under the United
25 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to
26 constitute a claim first made and reported during Interstate Fire & Casualty Company's
27 immediately preceding policy period, and stating that United National continued to reserve all
28 of its rights under the policy. Except as so admitted and alleged, United National lacks

1 sufficient knowledge, information or belief to respond to and on that basis denies each, every,
2 and all of the allegations contained in paragraph 47 of the complaint.

3 48. Responding to the allegations in paragraph 48 of the complaint, United National
4 denies each, every, and all of the allegations contained in paragraph 48 of the complaint.

5 49. Responding to the allegations in paragraph 49 of the complaint, United National
6 denies each, every, and all of the allegations contained in paragraph 49 of the complaint.

7 50. Responding to the allegations in paragraph 50 of the complaint, United National
8 admits and alleges that plaintiff makes the contentions set forth in paragraph 50 of the complaint.
9 Except as so admitted, United National lacks sufficient knowledge, information or belief to
10 respond and on that basis denies each, every, and all of the allegations contained in paragraph 50
11 of the complaint.

12 51. Responding to the allegations in paragraph 51 of the complaint, United National
13 incorporates by reference paragraphs 1 through 28 of this answer as though fully set forth here.

14 52. Responding to the allegations in paragraph 52 of the complaint, United National
15 admits and alleges that plaintiff makes the contentions set forth in paragraph 52 of the complaint.
16 Except as so admitted, United National lacks sufficient knowledge, information or belief to
17 respond and on that basis denies each, every, and all of the allegations contained in paragraph 52
18 of the complaint.

19 53. Responding to the allegations in paragraph 53 of the complaint, United National
20 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
21 and all of the allegations contained in paragraph 53 of the complaint.

22 54. Responding to the allegations in paragraph 54 of the complaint, United National
23 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
24 and all of the allegations contained in paragraph 54 of the complaint.

25 55. Responding to the allegations in paragraph 55 of the complaint, United National
26 admits and alleges that it issued a letter dated October 6, 2006, which speaks for itself, advising
27 that United National would not defend Cirrus in the *Tracy* action, and reserving United
28 National's rights to disclaim coverage for the *Tracy* action. United National further admits and

1 alleges that it issued a letter dated February 13, 2007, which speaks for itself, advising that Untied
2 National had determined that there was no coverage under the United National policy for the
3 *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a claim first
4 made and reported during Interstate Fire & Casualty Company's immediately preceding policy
5 period, and stating that United National continued to reserve all of its rights under the policy.
6 Except as so admitted, United National lacks sufficient knowledge, information or belief to
7 respond and on that basis denies each, every, and all of the allegations contained in paragraph 55
8 of the complaint.

9 56. Responding to the allegations in paragraph 56 of the complaint, United National
10 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
11 and all of the allegations contained in paragraph 56 of the complaint.

12
13 United National further alleges the following affirmative defenses:

14 1. As and for a first, separate defense, United National alleges that the complaint and
15 each claim therein do not state facts sufficient to constitute a cause of action against United
16 National.

17 2. As and for a second, separate defense, United National alleges that the plaintiff
18 lacks standing to bring this action.

19 3. As and for a third, separate defense, United National alleges that the complaint and
20 each cause of action in it are barred by the terms, provisions, conditions, limitations, and
21 exclusions of the alleged United National policy. United National reserves the right to amend its
22 answer to the Complaint to assert any additional defenses arising from the terms of the alleged
23 United National insurance policy, and/or applicable insurance policy terms, provisions,
24 conditions, limitations, and exclusions as may become apparent during the continuing course of
25 discovery in this action.

26 4. As and for a fourth, separate defense, United National alleges that the complaint
27 and each cause of action in it are barred by the terms, provisions, conditions, limitations, and
28 exclusions of a policy of liability insurance issued by Interstate Fire & Casualty Company, policy

1 number ASC-1000204, to named insured Cirrus Medical Staffing, LLC, for the policy period
2 January 27, 2005, to January 27, 2006. United National reserves the right to amend its answer to
3 the Complaint to assert any additional defenses arising from the terms of the alleged Interstate
4 insurance policy, and/or applicable insurance policy terms, provisions, conditions, limitations,
5 and exclusions as may become apparent during the continuing course of discovery in this action.
6

7 Wherefore United National prays for judgment as follows:

- 8 1. That the Court deny plaintiff's prayers for judicial declarations set forth in the
9 complaint;
10 2. That plaintiff take nothing by its complaint;
11 3. That United National be awarded its costs of suit incurred herein;
12 4. That United National be awarded its attorneys fees;
13 3. For such other and further relief as the Court deems just and proper.
14
15
16

17 **COUNTERCLAIM AGAINST FIREMANS' FUND INSURANCE COMPANY,**
18 **INTERSTATE FIRE & CASUALTY COMPANY, AND ROES 1 THROUGH 10**

19 Counterclaimant United National Insurance Company, for its counterclaim against
20 counterdefendants Fireman's Fund Insurance Company, Interstate Fire & Casualty Company, and
21 Roes 1 through 10, inclusive, alleges as follows:
22

23 **GENERAL ALLEGATIONS**

- 24 1. At all times herein mentioned, United National was and is a Pennsylvania
25 corporation with its principal place of business in Bala Cynwyd, Pennsylvania.
26 2. United National is informed and believes and thereon alleges that
27 counterdefendant Fireman's Fund Insurance Company is a California corporation with its
28 principal place of business in Novato, California.

1 3. United National is informed and believes and thereon alleges that
2 counterdefendant Interstate Fire & Casualty Company is an Illinois corporation, doing business in
3 California, with its principal place of business in Chicago, Illinois.

4 4. United National is unable to ascertain the true names and identities of those
5 counterdefendants designated as Roes 1 through 10, inclusive. United National will ask leave of
6 Court to amend this complaint and all subsequent pleadings to insert the true names and
7 capacities of these fictitiously named counterdefendants when ascertained. The allegations and
8 controversies alleged below with respect to the named counterdefendants Fireman's Fund and
9 Interstate apply equally to Roes 1 through 10.

10 5. Jurisdiction over United National's counterclaim is conferred by 28 U.S.C. §
11 1367(a).

12 6. Venue is proper in this Court under 28 U.S.C. § 1391(a)(1), because
13 counterdefendant Fireman's Fund is a resident of this district.

14 7. United National is informed and believes, and on that basis alleges, that Cirrus
15 Medical Staffing LLC was sued in underlying litigation styled *Tracy v. Lovelace Sandia Health*
16 *Services dba Albuquerque Regional Medical Center et al.*, which was filed in the State of New
17 Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005 07009.
18 United National is informed and believes, and on that basis alleges, that the *Tracy* action was a
19 medical-malpractice action that was filed on or about September 14, 2005.

20 8. United National is informed and believes, and on that basis alleges, that the first-
21 amended complaint in the *Tracy* action alleges, at paragraph 3, that Cirrus employee Cathy
22 Robinson was a "healthcare provider[]" who treated Marilyn Tracy," the decedent whose death
23 was the subject of the *Tracy* action. United National is informed and believes, and on that basis
24 alleges, that the first amended complaint further alleges, at paragraph 28, that Cirrus "acting
25 through its employee, agent and/or apparent agent or contractor, Cathy Robinson, RN, negligently
26 failed to inform the physician on call of Marilyn Tracy's status," as a result of which, according
27 to paragraph 23, Marilyn Tracy was pronounced dead on October 7, 2004.

28 9. United National is informed and believes, and on that basis alleges, that N.M. Stat.

1 Ann. § 41-5-15 provides as follows:

2
3 A. No malpractice action may be filed in any court against a qualifying health
4 care provider before application is made to the medical review commission
5 and its decision is rendered.

6
7 B This application shall contain the following:

8
9 (1) a brief statement of the facts of the case, naming the persons
10 involved, the dates and the circumstances, so far as they are known,
11 of the alleged act or acts of malpractice; and

12
13 (2) a statement authorizing the panel to obtain access to all medical and
14 hospital records and information pertaining to the matter giving rise
15 to the application, and, for the purposes of is consideration of the
16 matter only, waiving any claim of privilege as to the contents of
17 those records. Nothing in that statement shall in any way be
18 construed as waiving that privilege for any other purpose or in any
19 other context, in or out of court.

20
21 10. United National is informed and believes, and on that basis alleges, that N.M. Stat.
22 Ann. § 41-5-16 provides as follows:

23
24 A. Upon receipt of an application for review, the commission's director or his
25 delegate shall cause to be served a true copy of the application on the
26 health care providers involved. Service shall be effected pursuant to New
27 Mexico law. If the health care provider involved chooses to retain legal
28 counsel, his attorney shall informally enter his appearance with the

1 director.

2
3 B The health care provider shall answer the application for review and in
4 addition shall submit a statement authorizing the panel to obtain access to
5 all medical and hospital records and information pertaining to the matter
6 giving rise to the application, and, for the purposes of its consideration of
7 the matter only, waiving any claim of privilege as to the contents of those
8 records. Nothing in that statement shall in any way be construed as
9 waiving that privilege for any other purpose or in any other context, in or
10 out of court.

11
12 C. In instances where applications are received employing the theory of
13 respondeat superior or some other derivative theory of recovery, the
14 director shall forward such applications to the state professional societies,
15 associations or licensing boards of both the individual health care provider
16 whose alleged malpractice caused the application to be filed, and the health
17 care provider named a respondent as employer, master or principal.

18
19 11. United National is informed and believes, and on that basis alleges, that Interstate
20 and Roes 1 through 10 issued to Cirrus as named insured a policy of liability insurance, number
21 ASC-10000204, effective for the policy period January 27, 2005, to January 27, 2006. United
22 National is informed and believes, and on that basis alleges, that the Interstate policy generally
23 provides liability coverage to Cirrus on a claims-made-and-reported basis subject to limits of
24 \$1,000,000 for each incident and \$3,000,000 in the aggregate.

25 12. United National is informed and believes, and on that basis alleges, that the
26 Interstate policy sets forth the following language in Form 01-PL-4002 (03/04):

27 I. COVERAGE.

28 The Company will pay on behalf of the Insured all sums which the

1 **Insured** shall become legally obligated to pay as **Damages** for **Claims**
2 first made against the Insured and reported to the Company during the
3 **Policy Period**, as a result of **Bodily Injury, Property Damages** or
4 **Personal Injury** caused by an **incident**, provided always that such
5 **incident** happens:

6 A. on or after the policy effective date shown on the Declarations; or
7 B. at any time prior to the policy effective date shown on the
8 Declarations if;

- 9 1. such **incident** happens on or subsequent to the "prior acts
10 date" on the Declarations, and
11 2. no **insured** knew or could have reasonably foreseen that
12 such **incident** might be expected to be the basis of a **Claim**
13 or **Suit** on the effective date of this policy.

14 The Company will pay on behalf of the **insured** all sums which the
15 **insured** shall become legally obligated to pay as **Damages** to which this
16 insurance applies and the Company shall have the right and duty to defend
17 any **Suit** against the **Insured** seeking **Damages** on account of such **Bodily**
18 **Injury, Property Damage** or **Personal Injury**, even if any of the
19 allegations of the **Suit** are groundless, false or fraudulent, but the Company
20 shall not be obligated to pay any **Claims** or **Claims Expenses** or judgments
21 or continue to defend any **Suit** after the applicable limit of the Company's
22 liability has been exhausted by payment of judgments or settlements.

23 * * *

24 VI. **WHEN CLAIM IS CONSIDERED AS FIRST MADE**

25 A **Claim** shall be considered as being first made when the Company first
26 receives written notice from the **Insured** advising that a **Claim** has been
27 made and providing the details of the **Claim**.
28

1 All **Claims** arising out of the same or related **incident** shall be considered
2 as having been made at the item the first such **Claim** is made, and shall be
3 subject to the same limit of liability and only a single deductible, if any,
4 shall apply.

5 * * *

6 IX. DEFINITIONS

7 When used in this policy (including endorsement forming a part hereof):

8
9 “**Bodily Injury**” means bodily injury, sickness or disease, mental anguish,
10 psychological injury or emotional distress sustained by any person,
11 including death at any time resulting therefrom;

12
13 “**Claim**” means a demand for money or the filing of **Suit** naming the
14 **Insured** and, in either case, alleging a **Bodily Injury, Property Damage**
15 or **Personal Injury** as a result of an **Incident**.

16 * * *

17 “**Damages**” means compensatory judgments, settlement or awards but
18 does not include punitive or exemplary **Damages**, fines or penalties, the
19 return of fees or other consideration paid to the **insured**, or the portion of
20 any award or judgment caused by the multiplication of actual **Damages**
21 under federal or state law. However, if a **Suit** is brought against the
22 **Insured** with respect to a **Claim** for alleged acts or omissions falling
23 within the scope of coverage afforded by this insurance seeking both
24 compensatory and punitive or exemplary **Damages**, then the Company will
25 afford a defense to such action, without liability however, for payment of
26 such punitive or exemplary damages;

27 * * *

28 “**Incident**” means any act or omission in the rendering of or failure to

render services by the **Insured**, or by any person for whom the **Insured** is legally responsible, in the conduct of the business or professional occupation specified in the Declarations.

Any such act or omission together with all related acts or omissions shall be considered one "**Incident**" and be subject to the same limit of liability;

* * *

"**Suit**" means a civil proceeding in which **Damages** because of **Bodily Injury, Property Damage or Personal Injury** to which this insurance applies are alleged. "**Suit**" includes:

- A. an arbitration proceeding in which such **Damages** are claimed and to which the **insured** must submit or does submit with the Company's consent; or
- B. any other alternative dispute resolution proceeding in which such **Damages** are claimed and to which the **Insured** submits with the Company's consent.

13. United National issued to Cirrus as named insured a claims-made-and-reported professional liability insurance policy effective from January 27, 2006, to January 26, 2007, with policy number AH-0000267 (the "United National policy")

14. The United National policy states as follows:

[From Form CPA-119(2.2005):]

SECTION I—PROFESSIONAL LIABILITY COVERAGE

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as "compensatory damages" as a result of a "wrongful act." This insurance applies to injury only if a "claim" for damages to which no other insurance applies, because of the injury is first made against the insured and reported to us during the "policy period." This insurance does not apply to injury caused by a "wrongful act" that takes place outside of the "covered

territory” or was committed before the Retroactive Date shown in the
Declarations or after the “policy period.”

a. A “claim” by a person or organization seeking damages will be
deemed to have been made when notice of such “claim” is received
and recorded by the insured or by us, whichever comes first;

* * *

c. We will have the right and duty to select counsel and to defend any
“suit” seeking damages. However, we will have no duty to defend
the insured against any “suit” seeking damages for injury to which
this insurance does not apply

* * *

2. Exclusions

This insurance does not apply to:

* * *

s. Any “claim,” “suit,” or “wrongful act” that might result in a
“claim” or “suit,” of which any insured had knowledge or could
have reasonably foreseen, at the signing date of the application for
this insurance.

* * *

SECTION V—PROFESSIONAL LIABILITY CONDITIONS

* * *

4. Other Insurance

If other valid and collectible insurance with any other insurer is available to
the insured covering a “claim” also covered hereunder (except insurance
purchased to apply in excess of the limit of liability hereunder), this
insurance will be excess of, and not contribute with, such insurance. If the
insured has other coverage with us covered a “claim” also covered by this
policy or coverage Part, the insured must elect which policy or Coverage

1 Part will apply and we will be liable under the Coverage Part so elected
2 and will not be liable under any other policy or Coverage Part.

3 * * *

4 **5. Representations**

5 By accepting this policy, you agree:

- 6 a. The statements in the Declarations and application, made part of
7 this policy, are accurate and complete;
8 b. Those statements are based upon representations you made to us;
9 c. We have issued this policy in reliance upon your representations;
10 and
11 d. This policy embodies all of the agreements existing between you
12 and us or any of our agents relating to this insurance.

13 * * *

14 **SECTION VI—DEFINITIONS**

15 * * *

- 16 3. "Bodily injury" means bodily injury, sickness or disease sustained by a
17 person, including death resulting from any of these at any time.
18 4. "Claim" means a written demand upon the insured for "compensatory
19 damages," including, but not limited to, the service of "suit" or institution
20 of arbitration proceedings against the insured. "Claim" includes reports of
21 accidents, acts, errors, occurrences, offenses or omissions which may give
22 rise to a "claim" under this policy. "Claims" based on or arising out of the
23 same act or interrelated acts of one or more insured will be considered to
24 be based on a single "wrongful act."

25 * * *

- 26 11. "Suit" means a civil proceeding in which damages for injury to which this
27 insurance applies are alleged. "Suit" includes an arbitration proceeding
28 alleging such damages to which you must submit or submit with our

1 consent.

- 2 12. "Wrongful act" means any act, error or omission in the furnishing of
3 professional social services. It includes the furnishing of food, beverages,
4 medications or appliances in connection with those services. All
5 "wrongful acts" committed in the furnishing of professional social services
6 to any one person will be considered one "wrongful act." All interrelated
7 "wrongful acts" of one or more insured will be considered one "wrongful
8 act."

9
10 [From Form EPA-909 (5/2006):]

11 This endorsement modifies insurance provided under the following:

12 PROFESSIONAL LIABILITY COVERAGE PART

13 Paragraph 12. of SECTION VI.—DEFINITIONS is deleted and replaced by the
14 following:

- 15 12. "Wrongful act" means:
- 16 a. any act or omission in the furnishing of healthcare services
17 to a patient or client including the furnishing of food,
18 beverages, medications, medical treatment or appliances in
19 connection with such services and the postmortem handling
20 of human bodies.
- 21 b. All "wrongful acts" committed in the furnishing of services
22 to any one patient or client will be considered one
23 "wrongful act." All interrelated "wrongful acts" of one or
24 more insured will be considered one "wrongful act."

25
26 15. United National is informed and believes, and on that basis alleges, that Interstate
27 and/or Fireman's Fund agreed to defend and indemnify Cirrus in connection with the *Tracy*
28 pursuant to the terms and provisions of the Interstate policy.

1 FIRST CLAIM FOR DECLARATORY JUDGMENT—DUTY TO DEFEND

2 16. United National incorporates by reference the allegations of paragraphs 1-15 of
3 this counterclaim.

4 17. An actual controversy has arisen and now exists between United National,
5 Fireman's Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties
6 under the Interstate and United National policies regarding the underlying *Tracy* action. United
7 National contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were
8 required to defend Cirrus in connection with the *Tracy* action, and that United National had no
9 obligation to defend Cirrus in connection with the *Tracy* action. On the other hand, United
10 National is informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and
11 Roes 1 through 10, contend that they had no obligation to defend Cirrus in the *Tracy* action and
12 that United National alone was obligated to defend Cirrus in the *Tracy* action, or, alternately, that
13 Fireman's Fund, Interstate, and United National were jointly obligated to defend Cirrus in
14 connection with the *Tracy* action. United National requests this Court to make and enter its
15 binding judicial declarations in accordance with United National's contentions set forth in this
16 paragraph. The requested declarations are both necessary and proper at this time under the
17 circumstances in that the interest of judicial economy and substantial justice will be served
18 thereby.

19
20 SECOND CLAIM FOR DECLARATORY JUDGMENT—DUTY TO INDEMNIFY

21 18. United National incorporates by reference the allegations of paragraphs 1-15 of
22 this counterclaim

23 19. An actual controversy has arisen and now exists between United National, Fireman's
24 Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties under the
25 Interstate and United National policies regarding the underlying *Tracy* action. United National
26 contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were required to
27 indemnify Cirrus in connection with the *Tracy* action, and that United National had no obligation
28 to indemnify Cirrus in connection with the *Tracy* action. On the other hand, United National is

1 informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and Roes 1
2 through 10, contend that they had no obligation to indemnify Cirrus in the *Tracy* action and that
3 United National alone was obligated to indemnify Cirrus in the *Tracy* action, or, alternately, that
4 Fireman's Fund, Interstate, and United National were jointly obligated to indemnify Cirrus in
5 connection with the *Tracy* action. United National requests this Court to make and enter its
6 binding judicial declarations in accordance with United National's contentions set forth in this
7 paragraph. The requested declarations are both necessary and proper at this time under the
8 circumstances in that the interest of judicial economy and substantial justice will be served
9 thereby.

10 20. If the Court enters a judicial declaration in accordance with United National's
11 contentions set forth in the preceding paragraph, United National is entitled to recover from
12 defendants Fireman's Fund, Interstate, and Roes 1 through 10, or any of them, \$100,000, plus
13 prejudgment interest under Cal. Civ. Code §§ 3287(a) and 3289(b), to reimburse United National
14 for its contribution toward the settlement of the *Tracy* action.

15
16 WHEREFORE, United National prays for judgment as follows:

- 17 a. That the Court make and enter a binding judicial declaration of the parties'
18 respective rights and duties in accordance with United National's contentions set
19 forth in paragraph 17 above,
- 20 b. That the Court make and enter a binding judicial declaration of the parties'
21 respective rights and duties in accordance with United National's contentions set
22 forth in paragraph 19 above,
- 23 c. That the Court order and enter a money judgment requiring counterdefendants
24 Fireman's Fund, Interstate, Roes 1 through 10, and any of the them, to reimburse
25 United National \$100,000, plus prejudgment interest under Cal. Civ. Code
26 §§3287(a) and 3289(b), for the money it contributed to settlement of the *Tracy*
27 action.
- 28 d. That United National be awarded its costs of suit incurred herein; and

1 e. For such other and further relief as the Court deems just and proper.

2
3 Respectfully submitted,

4 NIELSEN, HALEY & ABBOTT LLP

5
6 Dated: October 1, 2007

By: 

Thomas H. Nienow

7 Attorneys for Defendant and Counterclaimant
8 UNITED NATIONAL INSURANCE COMPANY
9
10
11

12 **DEMAND FOR JURY TRIAL**

13 Defendant and counterclaimant United National Insurance Company demands trial by jury in
14 this action.

15 Respectfully submitted,

16 NIELSEN, HALEY & ABBOTT LLP

17
18 Dated: October 1, 2007

By: 

Thomas H. Nienow

19 Attorneys for Defendant and Counterclaimant
20 UNITED NATIONAL INSURANCE COMPANY
21
22
23
24
25
26
27
28

Fireman's Fund Insurance Co. v. United National Ins. Co.

United State District Court, Northern District Court No.: C 07-04943 JL

PROOF OF SERVICE

I declare that:

I am a citizen of the United States, employed in the County of San Francisco. I am over the age of eighteen years, and not a party to the within cause. My business address is 44 Montgomery Street, Suite 750, San Francisco, California 94104. On the date set forth below I served the following document(s) described as:

ANSWER AND COUNTERCLAIM OF UNITED NATIONAL INSURANCE COMPANY.

☐ (BY FACSIMILE) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date.

☐ (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Francisco, California.

☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand this date to the offices of the addressee(s).

☐ (BY OVERNIGHT DELIVERY) I caused such envelope(s) to be delivered to an overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it is to be served.

☒ (BY ELECTRONIC SERVICE) by submitting an electronic version of the document(s) to be served on all parties listed on the service list on file with the court as of this date.

Attorney for Plaintiff, Fireman's Fund Ins. Co.

Christopher J. Borders
Casey A. Hatton
Hinshaw & Culbertson LLP
One California Street, 18th Floor
San Francisco, CA 94111
Tel: (415) 362-6000
Fax: (415) 834-9070

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 1 2007, at San Francisco, California.



Fatima Puente

Exhibit 2

JAN- 4-06 WED 3:03 PM RODEY LAW FIRM

FAX NO. 15057687395

P. 1

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RYAN J. DAVIS
CHRISTOPHER D. LEE
JUSTIN A. MURPHY
TODD E. ROBB
STEVEN L. MATTENBACH
SANDRA L. WELLS
WARR L. JACKSON

January 4, 2006

Via Facsimile (800-506-5309) and U.S. Mail

Cirrus Medical Staffing
4651 Charlotte Park Drive, Suite 400
Charlotte, NC 28217

Attention: Legal Department

Re: Tracy v. Lovelace Sandia Health System

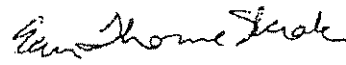
Dear Legal Department Representative:

I represent Albuquerque Regional Medical Center and Lovelace Sandia Health System in a medical malpractice action brought by Ben Tracy as personal representative of the Estate of Marilyn Tracy. Your nurse, Cathy Robinson, was one of the nurses who cared for Mrs. Tracy prior to her death. I believe it is possible that opposing counsel, Pia Salazar, will be contacting you about how to accomplish service of process. She has expressed the intention to bring you into the case. Even if she decided not to do so, she will likely try to subpoena Ms. Robinson to give a deposition. I would appreciate the opportunity to visit prior to the deposition with whatever attorney you have represent her. I hope it is helpful to have prior notice of the possible suit or deposition. Please do not hesitate to call if you have any questions about the case.

Sincerely yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By:



Ellen Thorne Skrak

ETS:br

IFC00453

JAN- 5-06 THU 12:13 PM RODEY LAW FIRM

FAX NO. 15057687395

P. 1

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ELLEN THORNE SKRAK

Direct Number:

768-7232

FACSIMILE TRANSMITTAL SHEET

TELECOPIER NUMBER: (505) 768-7395

DATE: January 5, 2006

TO: Greg Allen

FAX No. (704) 887-0164

FROM: Ellen Thorne Skrak

OPERATOR: Barbara Rael

TOTAL NUMBER OF PAGES, INCLUDING THIS PAGE:

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Message: Tracy v. Lovelace Sandia Health System

Attached please find the Complaint filed in this matter.

IFC00452

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P. 2

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO

BEN TRACY, as Personal Representative of
the Estate of MARILYN TRACY, Deceased,

Plaintiff,

vs.

No.

LOVELACE SANDIA HEALTH SERVICES, d/b/a
ALBUQUERQUE REGIONAL MEDICAL CENTER,

Defendant.

SUMMONS(ES) ISSUED

CV-2005 07009

COMPLAINT FOR WRONGFUL DEATH

For his Complaint, Ben Tracy, as Personal Representative of the Estate of Marilyn Tracy,
states as follows:

1. Ben Tracy is the court-appointed Personal Representative of the Estate of Marilyn Tracy.
2. At all material times to this Complaint, Lovelace Sandia Health Services, d/b/a
Albuquerque Regional Medical Center, hereinafter "ARMC", upon information and
belief, was and is a general/acute care hospital open to the public located, and having its
principle place of business, in Albuquerque, Bernalillo County, New Mexico.
3. At all material times to this Complaint, the nurses, respiratory therapists, and other
healthcare providers who cared for Marilyn Tracy were employees, agents, and/or
apparent agents of ARMC, acting within the course and scope of their employment.
4. Upon information and belief, C. Robinson, RN, L. Fellion (or Tellion), RN, and M.M.
Graff, RT, are employees of ARMC, who were acting within the scope and course of their

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P. 3

employment at all material times.

5. For the care complained of herein, Marilyn Tracy was a patient of ARMC at all relevant times.
6. While a patient of ARMC, the nursing staff, respiratory therapists, and/or other healthcare providers negligently failed to monitor Marilyn Tracy's fluid status, negligently failed to respond to worsening vital signs and negligently failed to appropriately notify the physician on call that Marilyn Tracy's status was not improving. In addition, the nurses negligently failed to continue to monitor Marilyn Tracy, despite her worsening condition, such that she was allowed to deteriorate, become unresponsive, apneic, go into asystole and code.
7. On October 2, 2004, Marilyn Tracy was admitted to ARMC.
8. On October 5, 2004, Marilyn Tracy was taken to surgery for an exploratory laparotomy and lysis of adhesions. The surgery was successful and at 8:00 p.m. that evening, Marilyn Tracy was discharged from the PACU and was back on the regular floor.
9. On October 6, 2004, Marilyn Tracy was noted to have an elevated pulse rate, a low blood pressure, and an increased oxygen requirement of 4-5 liters throughout the morning.
10. At 1:30 p.m., James Williams, MD, came in to evaluate Marilyn Tracy and noted that she had a low urine output and an increased creatinine level. Dr. Williams appropriately ordered a fluid bolus of 500 cc's to adjust her fluid status.
11. Later, at 4:00 p.m., Marilyn Tracy's pulse was 102, her blood pressure was 112/51, and her oxygen saturations were 91% on 3 liters of oxygen.

JAN- 5-06 THU 12:15 PM RODEY LAW FIRM

FAX NO. 15057687395

P. 4

12. At 5:15 p.m., Dr. Williams appropriately ordered a second fluid bolus of 500 cc's to be given over two hours to adjust Marilyn Tracy's fluid status.
13. Despite Dr. William's concerns about Marilyn Tracy's fluid status, the nurses negligently failed to record Marilyn Tracy's intake and output after 5:00 p.m. on October 6, 2004.
14. No vital signs were taken of Marilyn Tracy between 5:00 p.m. and 8:00 p.m. At 8:00 p.m., Marilyn Tracy's pulse was tachycardic at 130, her blood pressure was low at 90/54, and she required 3 liters of oxygen to maintain her saturations at 95 percent. The nurses negligently failed to inform Dr. Williams of the fact that Marilyn Tracy's vital signs were not improving. The nurses also negligently failed to record Marilyn Tracy's fluid status.
15. At 9:55 p.m., respiratory therapy notes that Marilyn Tracy's oxygen saturations are 68% on room air, and she required 3.5 liters of oxygen to get her saturations back up to 87%. The nurses and/or respiratory therapist failed to inform Dr. Williams of Marilyn Tracy's concerning oxygen saturation status.
16. On October 7, 2004, at 12:00 Midnight, Marilyn Tracy had a pulse of 96, a blood pressure of 88/62, and oxygen saturations of 92% on 3 liters of oxygen. These are the last recorded vital signs the nurses performed on Marilyn Tracy. The nurses' failure to notify Dr. Williams and perform more frequent vital signs, given Marilyn Tracy's condition, was a departure from the standard of care.
17. On October 7, 2004, at 5:20 a.m., Marilyn Tracy was found apneic and in asystole. A code was instituted but was unsuccessful. Marilyn Tracy was pronounced dead at 5:54 a.m.
18. Defendant ARMC acting through its employees, agents and/or apparent agents or

JAN- 5-06 THU 12:15 PM RODEY LAW FIRM

FAX NO. 15057687395

P. 5

contractors negligently failed to monitor Marilyn Tracy's fluid status, vital signs and oxygen saturation. As a result, Marilyn Tracy was allowed to deteriorate and become unresponsive.

19. Defendant ARMC, acting through its employees, agents and/or apparent agents or contractors of ARMC, including, but not limited to, Nurse C. Robinson and L. Fellion (or Tellion), RN and M.M. Graff, RT, negligently failed to inform the physician on call of Marilyn Tracy's status.
20. As a direct and proximate result of ARMC's negligence, and its employees', agents', apparent agents' and/or contractors' negligence, Marilyn Tracy was allowed to deteriorate, become unresponsive and die on October 7, 2004.
21. ARMC, acting through its employees, agents, apparent agents, or contractors, failed to exercise ordinary care and failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified hospital and hospital related businesses operating under similar circumstances, giving due consideration to the locality involved. Such acts or omissions include, but are not necessarily limited to, negligent hiring, staffing, training, supervision, evaluating, monitoring and retention of healthcare employees, and contractors on the hospital staff.
22. As a direct and proximate result of ARMC's negligence, and its employees', agents', apparent agents', and/or contractors' negligence, Marilyn Tracy became unresponsive, apneic, had asystole, coded and died.

WHEREFORE, Ben Tracy, as Personal Representative of the Estate of Marilyn Tracy, requests compensatory damages in an amount to be determined at trial, for the interest including

ACORD GENERAL LIABILITY NOTICE OF OCCURRENCE/CLAIM		DATE (MM/DD/YYYY)	
		01/05/2006	
AGENCY PHONE (A/C, No, Ext) 704-865-8584 Watson Insurance Agency, Inc. 245 E. Second Avenue P. O. Box 879 Gastonia NC 28053 Robert P. Watson - Trans Accts FAX 704-866-9866 E-MAIL (A/C, No) ADDRESS CODE SUB CODE IDENTITY CUSTOMER ID CIRR-1		NOTICE OF OCCURRENCE DATE OF OCCURRENCE AND TIME AM DATE OF CLAIM PREVIOUSLY REPORTED NOTICE OF CLAIM 01/04/06 PM YES X NO EFFECTIVE DATE EXPIRATION DATE POLICY TYPE RETROACTIVE DATE 01/27/05 01/27/06 OCCURRENCE CLAIMS MADE COMPANY NAIC CODE MISCELLANEOUS INFO (Site & location code) Interstate Fire and Cas. Co. POLICY NUMBER REFERENCE NUMBER ASC1000204	
INSURED NAME AND ADDRESS SOC SEC # OR FEIN: Cirrus Medical Staffing, LLC 4651 Charlotte Pk Dr., Ste 400 Charlotte NC 28217 RESIDENCE PHONE (A/C, No) BUSINESS PHONE (A/C, No, Ext) 800 299-8132		CONTACT CONTACT INSURED NAME AND ADDRESS Greg Allen RESIDENCE PHONE (A/C, No) BUSINESS PHONE (A/C, No, Ext) WHERE TO CONTACT WHEN TO CONTACT	
OCCURRENCE LOCATION OF OCCURRENCE (include city & state) DESCRIPTION OF OCCURRENCE (Use separate sheet if necessary) See attached letter received by insured regarding medical malpractice issue.---Please note that umbrella & GL coverage written thru Interstate Fire also.			
POLICY INFORMATION COVERAGE PART OR FORMS (insert form #s and edition dates) GENERAL AGGREGATE PROD/COMP OP AGG PERS & ADV INJ EACH OCCURRENCE FIRE DAMAGE MEDICAL EXPENSE DEDUCTIBLE PO UMBRELLA EXCESS X UMBRELLA EXCESS CARRIER: Interstate XSP-1100100 LIMITS: AGGR PER CLAIM/ACC SHR DEC TYPE OF LIABILITY PREMISES: INSURED IS OWNER TENANT OTHER OWNER'S NAME & ADDRESS (if not insured) PRODUCTS: INSURED IS MANUFACTURER VENDOR OTHER MANUFACTURER'S NAME & ADDRESS (if not insured) WHERE CAN PRODUCT BE SEEN? OTHER LIABILITY INCLUDING COMPLETED OPERATIONS (Explain) GL written thru Interstate Fire--GL11120439			
INJURED/PROPERTY DAMAGED NAME & ADDRESS (Injured/Owner) Marilyn Tracy action brought by Ben Tracy AGE SEX OCCUPATION EMPLOYER'S NAME & ADDRESS PHONE (A/C, No, Ext) DESCRIBE INJURY See attached WHERE TAKEN WHAT WAS INJURED DOING? FATALITY ESTIMATE AMOUNT WHERE CAN PROPERTY BE SEEN? WHEN CAN PROPERTY BE SEEN? DESCRIBE PROPERTY (Type, model, etc)			
WITNESSES NAME & ADDRESS BUSINESS PHONE (A/C, No, Ext) RESIDENCE PHONE (A/C, No) REMARKS REPORTED BY email/Greg Allen REPORTED TO Rob Watson SIGNATURE OF INSURED SIGNATURE OF PRODUCER Robert P. Watson - Trans Accts			

ACORD 3 (2004/06)

NOTE: IMPORTANT STATE INFORMATION ON REVERSE SIDE © ACORD CORPORATION 1986

IFC00459

LS

PA

NM

55406001460



"Terry Bellotti"
<tbellotti@hciusa.com>
01/06/2006 01:20 PM

To "Interstate - Claims - Sheila Robertson" <newloss@ffic.com>
cc
bcc

Subject Cirrus Medical Staffing, LLC, Pol# ASC1000204

Jody

206/218

Sheila,
Please see attached notice of claim and letter from a lawyer office. Contact
Greg Allen if you have any question.

Terry Bellotti
Health Care Insurers, a division of Risk Placement Services, Inc.
3030 N. Rocky Point Dr. W., Suite 161
Tampa, FL 33607
(813) 287-6308
(719) 528-8323 FAX
tbellotti@hciusa.com

Please visit our web site www.hciusa.com

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Exhibit 3

JAN-10-06 TUE 11:42 AM RODEY LAW FIRM

FAX NO. 15057687395

P. 1

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

COUNSELORS AND ATTORNEYS AT LAW

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P.O. BOX 1888
ALBUQUERQUE, NEW MEXICO 87103

TELEPHONE (505) 765-5900

FACSIMILE (505) 765-7395

ELLEN THORNE SKRAK

Direct Number:
768-7232

FACSIMILE TRANSMITTAL SHEET

TELECOPIER NUMBER: (505) 768-7395

DATE: January 10, 2006

TO: Jennifer Beran

FAX No. (312) 346-3567

FROM: Ellen Thorne Skrak

OPERATOR: Barbara Rael

TOTAL NUMBER OF PAGES, INCLUDING THIS PAGE: 6

If you do not receive any of these pages, please call the operator at (505) 7667565

IMPORTANT!

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS CONFIDENTIAL AND INTENDED SOLELY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, COPYING, OR UNAUTHORIZED USE OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE IN ERROR, PLEASE NOTIFY THE SENDER IMMEDIATELY BY TELEPHONE, AND RETURN THE FACSIMILE TO THE SENDER AT THE ABOVE ADDRESS VIA THE UNITED STATES POSTAL SERVICE. THANK YOU.

Message: Ben Tracy, Estate of Marilyn Tracy v. Lovelace Sandia, et al.

Attached please find the Complaint filed in the Marilyn Tracy matter.

IFC00451

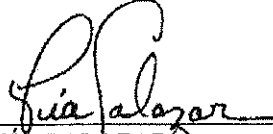
JAN-10-06 TUE 11:45 AM RODEY LAW FIRM

FAX NO. 15057687395

P. 6

pre-judgment interest, costs, and for such other and further relief as this Court may deem just and appropriate.

Pia Salazar & Patrick W. Sullivan

A handwritten signature in black ink, appearing to read "Pia Salazar", is written over a horizontal line.

PÍA SALAZAR
Attorneys for Plaintiff
6301 Indian School Rd., NE, Ste. 300
Albuquerque, NM 87110
(505) 314-1414
(505) 314-1419

Exhibit 4

NIELSEN, HALEY & ABBOTT LLP

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State Bar of California Board of Legal Specialization
* Also admitted in Nevada

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TEL (213) 239-9009

May 4, 2008

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Casey A. Hatton, Esq.
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One California Street
18th Floor
San Francisco, CA 94111

By Facsimile and U.S. Mail

Re: *Interstate Fire & Casualty Co. v. United National Ins. Co.*,
U.S.D.C., N.D. Cal., Action No. CV 07-04943 JL
Our file: 3701-448

Dear Ms. Hatton:

Your April 30, 2008, letter omits topics we discussed and doesn't accurately reflect what I said.

Of immediate concern, this will clarify that I will provide you, on an informal basis, the nonprivileged portions of United National's claim file for the *Tracy* action, as well as a privilege log. I am hoping to be able to provide these documents to you by May 9, and will let you know if it becomes unfeasible. I also wish to confirm that your client's obligations under the applicable rules and law to respond to United National's discovery requests have not been altered or waived in any way.

Having now had a chance to review the documents you recently produced, I also want to let you know that United National intends to rely upon these documents (many of which were not previously provided to United National) in connection with the cross-motions for summary judgment, including but not limited to the following documents:

- Complaint in the action styled *Tracy v. Lovelace Sandia Health Services etc.*, State of New Mexico, Second Judicial District, County of Bernalillo, No. CV 2005 07009, Bates Nos. IFC00454-IFC00458.

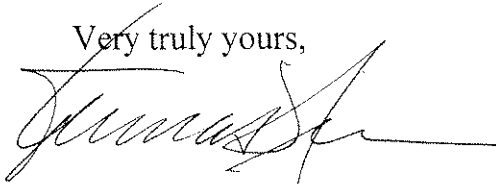
Casey A. Hatton, Esq.
May 4, 2008
Page 2

- Letter from Ellen Thorne Skrak to Cirrus Medical Staffing dated 1/4/06, Bates No. IFC00452.
- Accord "General Liability Notice of Occurrence/Claim" dated 1/5/06, Bates No. IFC00459.
- Facsimile from Ellen Thorne Skrak to Greg Allen dated 1/6/06, Bates No. IFC00452 and IFC00454-00458.
- E-mail from Terry Bellotti to Sheila Robertson of Interstate dated 1/6/06, Bates No. IFC00450.
- Facsimile from Ellen Thorne Skrak to Jennifer Beran dated 1/10/06, Bates No. IFC00451.
- Letter from Ellen Thorne Skrak to Jennifer Beran dated 1/10/06, Bates No. IFC00475.
- E-mail from Jennifer Beran to Ellen Thorne Skrak dated 1/10/06, Bates No. IFC00447.

In this regard, enclosed please find United National's supplemental disclosures under Fed.R.Civ.P., Rule 26(e)(1)(A). Additionally, you did not provide any log or similar documentation to substantiate the information and documents redacted from your recent production. When this information is eventually provided to us it may affect the available documents and, thus, the facts and chronology relevant to the cross-motions.

I look forward to receiving the proposed joint statement of facts.

Very truly yours,



Thomas H. Nienow

Enclosure

THN:ms

1 JAMES C. NIELSEN (111889)
2 *jnielsen@nielsenhaley.com*
3 THOMAS H. NIENOW (136454)
4 *tnienow@nielsenhaley.com*
5 NIELSEN, HALEY & ABBOTT LLP
6 44 Montgomery Street, Suite 750
7 San Francisco, California 94104
8 Telephone: (415) 693-0900
9 Facsimile: (415) 693-9674

10 Attorneys for Defendant and Counterclaimant
11 UNITED NATIONAL INSURANCE COMPANY

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO/OAKLAND DIVISION

15 INTERSTATE FIRE & CASUALTY
16 COMPANY,

17 Plaintiff,

18 v.

19 UNITED NATIONAL INSURANCE
20 COMPANY and DOES 1 through 10.

21 Defendants.

22 UNITED NATIONAL INSURANCE
23 COMPANY,

24 Counterclaimant,

25 v.

26 INTERSTATE FIRE & CASUALTY
27 COMPANY and Roes 1 through 10,

28 Counterdefendants.

Action No.: C 07-04943 JL

DEFENDANT AND COUNTERCLAIMANT
UNITED NATIONAL'S SUPPLEMENTAL
DISCLOSURES, F.R.C.P. 26(e)(1)(A).

1 Defendant and Counterclaimant United National Insurance Company discloses the
2 following additional information under Fed.R.Civ.P. 26(e)(1)(A):
3

4 PRELIMINARY STATEMENT

5 The following disclosures are based upon information, legal analysis, and
6 documents that are currently known and available to United National after a reasonable
7 inquiry and diligent search. United National has not completed its investigation,
8 discovery or trial preparation in this matter. Further investigation, discovery, or legal
9 analysis may disclose additional facts or documents that are currently unknown to United
10 National, or may alter the relevance, discoverability or admissibility of facts and
11 documents currently known to United National. United National, therefore, reserves the
12 right to supplement this response and to introduce into evidence facts, contentions, or
13 documents of which United National is currently unaware or of which the relevance,
14 discoverability or admissibility is disclosed through further investigation, discovery, or
15 legal analysis. Additionally, United National reserves the right to object, on any basis, to
16 the introduction of the disclosures herein as evidence in this or any other matter. United
17 National reserves the right to supplement or amend this disclosure up to the time of trial.

18 The disclosures provided herein are solely for the purpose of this action and no
19 incidental or implied admissions of fact or liability are intended or should be inferred.
20 The fact that United National has disclosed information or documents is not intended and
21 shall not be construed as a waiver of any basis upon which United National may object to
22 the introduction of the information or documents, including, but not limited to, the
23 attorney-client privilege and the attorney-work-product doctrine.
24

25 DISCLOSURES

26 1. Witness information.

27 United National hereby discloses the following additional names and, if known, the
28 addresses and telephone numbers, of individuals likely to have discoverable information

that United National may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information:

Witness: Person Most Knowledgeable
Watson Insurance Agency, Inc.
P.O. Box 879
Gastonia, NC 28053

Information: Allegations of and facts concerning the underlying litigation styled *Tracy v. Cirrus Medical Staffing et al.*, State of New Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005 07009, the settlement of the *Tracy* action, notice to Interstate Fire & Casualty Company of the *Tracy* action, any proceedings related to the *Tracy* action, or the facts and circumstances involved in or giving rise to the *Tracy* action or any related proceeding.

Witness: Jennifer Beran AIC
Interstate Fire & Casualty Company
33 W. Monroe, 12th Floor
Chicago, IL 60603
(312) 629-2300

Information: Allegations of and facts concerning the underlying litigation styled *Tracy v. Cirrus Medical Staffing et al.*, State of New Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005 07009, the settlement of the *Tracy* action, notice to Interstate Fire & Casualty Company of the *Tracy* action, any proceedings related to the *Tracy* action, or the facts and circumstances involved in or giving rise to the *Tracy* action or any related proceeding.

Witness: Ellen Thorne Skrak or another attorney from
Rodey, Dickason, Sloan, Akin & Robb, P.A.
201 Third Street NW, Suite 2200
Albuquerque, NM 87102
(505) 765-5900

Information: Allegations of and facts concerning the underlying litigation styled *Tracy v. Cirrus Medical Staffing et al.*, State of New Mexico, Second Judicial District Court, County of Bernalillo,

1 action number CV 2005 07009, the settlement of the *Tracy*
2 action, notice to Interstate Fire & Casualty Company of the
3 *Tracy* action, any proceedings related to the *Tracy* action, or
4 the facts and circumstances involved in or giving rise to the
5 *Tracy* action or any related proceeding.

6 **2. Documents.**

7 United National discloses the following descriptions of additional documents, data
8 compilations, and tangible things that are in its possession, custody, or control, which
9 United may use to support its claims or defenses, unless solely for impeachment:

- 10 • All documents disclosed by Interstate in this action and bearing Bates Nos.
11 IFC00001-IFC01265, including but not limited to the following documents
12 specifically identified by Bates No. below:
- 13 • Complaint in the action styled *Tracy v. Lovelace Sandia Health Services etc.*, State
14 of New Mexico, Second Judicial District, County of Bernalillo, No. CV 2005
15 07009, Bates Nos. IFC00454-IFC00458.
- 16 • Letter from Ellen Thorne Skrak to Cirrus Medical Staffing dated 1/4/06, Bates No.
17 IFC00452.
- 18 • Accord "General Liability Notice of Occurrence/Claim" dated 1/5/06, Bates No.
19 IFC00459.
- 20 • Facsimile from Ellen Thorne Skrak to Greg Allen dated 1/6/06, Bates No.
21 IFC00452 and IFC00454-00458.
- 22 • E-mail from Terry Bellotti to Sheila Robertson of Interstate dated 1/6/06, Bates No.
23 IFC00450.
- 24 • Facsimile from Ellen Thorne Skrak to Jennifer Beran dated 1/10/06, Bates No.
25 IFC00451.
- 26 • Letter from Ellen Thorne Skrak to Jennifer Beran dated 1/10/06, Bates No.
27 IFC00475.
- 28 • E-mail from Jennifer Beran to Ellen Thorne Skrak dated 1/10/06, Bates No.

1 IFC00447.

2
3 **3. Itemization of Damages.**

4 United National reiterates its estimate of its damages, as currently known and
5 available:

6 \$100,000, plus prejudgment interest under Cal. Civ. Code §§3287(a) and 3289(b),
7 for the money it contributed to settlement of the underlying *Tracy* action.

8
9 United National notes that as to all matters set forth above, discovery is continuing.

10
11 NIELSEN, HALEY & ABBOTT LLP

12
13
14 Dated: May 2, 2008

By: 

Thomas H. Nienow

Attorneys for Defendant and Counterclaimant
UNITED NATIONAL INSURANCE COMPANY

Exhibit 5

NIELSEN, HALEY & ABBOTT LLP

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AUGUST L. LOHUARU
DONALD L. MABRY
JAMES C. NIELSEN *
THOMAS H. NIENOW

* Certified Specialist, Appellate Law
State Bar of California Board of Legal Specialization
* Also admitted in Nevada

June 2, 2008

WRITER'S DIRECT DIAL
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tnienow@nielsenhaley.com

Casey A. Hatton, Esq.
Hinshaw & Culbertson LLP
One California Street
18th Floor
San Francisco, CA 94111

By Facsimile and U.S. Mail

Re: *Interstate Fire & Casualty Co. v. United National Ins. Co.*,
U.S.D.C., N.D. Cal., Action No. CV 07-04943 JL
Our file: 3701-448

Dear Ms. Hatton:

I recently sent you a supplemental disclosure of documents under Fed.R.Civ.P., Rule 26(f). The supplemental disclosure was necessitated by documents that your client produced to United National in this litigation for the first time.

Upon further consideration, I have determined that it is advisable for United National to amend its counterclaim as well. I have accordingly amended the counterclaim by adding new paragraphs 8-11 to it. The remainder of the answer and counterclaim is unchanged.

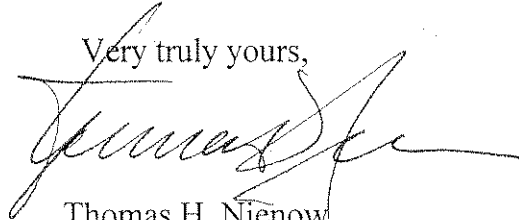
In order to facilitate filing of the amended answer and counterclaim, I have prepared and attach to this letter a stipulation allowing United National leave to file the amended answer and counterclaim pursuant to Fed.R.Civ.P., Rule 15(a)(2). I have attached a copy of the stipulation and the amended answer and counterclaim for your review.

If the stipulation and amended pleading are acceptable to you, will you please sign and return to me your signature on the stipulation at your earliest convenience? Of

Casey A. Hatton, Esq.
June 2, 2008
Page 2

course, if you would like to discuss this matter or any concerns that you may have concerning my proposal, please feel free to contact me. If we cannot agree upon a stipulation it appears that it will be necessary for United National to file a noticed motion, which I would like to avoid if possible.

Thank you for your attention to the above.

Very truly yours,

Thomas H. Nienow

Enclosures

THN:ms

JAMES C. NIELSEN (111889)

jnielsen@nielsenhaley.com

THOMAS H. NIENOW (136454)

tnienow@nielsenhaley.com

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Facsimile: (415) 693-9674

Attorneys for Defendant and Counterclaimant

UNITED NATIONAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

FIREMAN'S FUND INSURANCE
COMPANY,

Plaintiff,

v.

UNITED NATIONAL INSURANCE
COMPANY and DOES 1 through 10.

Defendants.

UNITED NATIONAL INSURANCE
COMPANY, a Pennsylvania corporation,

Cross-complainant,

v.

FIREMAN'S FUND INSURANCE
COMPANY, a California corporation,
INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation, and
Roes 1 through 10, inclusive,

Cross-defendants.

Action No.: C 07-04943 JL

STIPULATION FOR FILING OF UNITED
NATIONAL'S AMENDED ANSWER AND
COUNTERCLAIM; ORDER

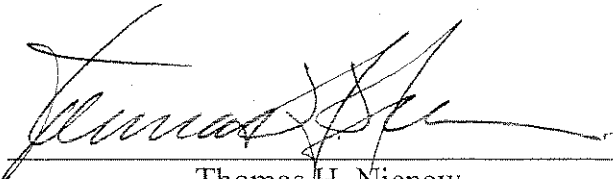
Accompanying Document: Amended
Answer and Counterclaim.

STIPULATION

Defendant and counterclaimant United National Insurance Company and plaintiff and counterdefendant Interstate Fire & Casualty Company, through the signatures of their counsel below, hereby stipulate that United National may file the amended answer and counterclaim attached hereto as Exhibit 1 pursuant to Fed.R.Civ.P, Rule 15(a)(2), that the amended answer and counterclaim will be deemed filed on the date the Court signs an order permitting the filing of the amended answer and counterclaim, that Interstate waives notice and service of the amended answer and counterclaim, and that, pursuant to Fed.R.Civ.P., Rule 15(a)(3), Interstate shall have 10 days from the date the court's order is filed to answer or otherwise respond to the amended answer and counterclaim.

NIELSEN, HALEY & ABBOTT LLP

Dated: June 2, 2008

By: 
Thomas H. Nienow
Attorneys for Defendant and Counterclaimant
UNITED NATIONAL INSURANCE COMPANY

HINSHAW & CULBERTSON LLP

Dated: June __, 2008

By: _____
Casey A. Hatton
Attorneys for Plaintiff and Counterdefendant
INTERSTATE FIRE & CASUALTY COMPANY

ORDER

The parties having executed the above stipulation, the Court, pursuant to Fed.R.Civ.P., Rule 15(a)(2), hereby orders that defendant and counterclaimant United National Insurance Company is given leave to file its amended answer and counterclaim attached hereto as Exhibit 1. It is further ordered that the amended answer and counterclaim shall be deemed filed on the date this order is filed, that notice and service shall not be required, and that Interstate shall have 10 days to answer or otherwise respond to the amended answer and counterclaim.

Dated: June __, 2008

Honorable Marilyn Hall Patel
UNITED STATES DISTRICT JUDGE

EXHIBIT 1

1 JAMES C. NIELSEN (111889)
2 *jnielsen@nielsenhaley.com*
3 THOMAS H. NIENOW (136454)
4 *tnienow@nielsenhaley.com*
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10 Attorneys for Defendant and Counterclaimant
11 UNITED NATIONAL INSURANCE COMPANY

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO/OAKLAND DIVISION

15 FIREMAN'S FUND INSURANCE
16 COMPANY,

17 Plaintiff,

18 v.

19 UNITED NATIONAL INSURANCE
20 COMPANY and DOES 1 through 10.

21 Defendants.

22 UNITED NATIONAL INSURANCE
23 COMPANY, a Pennsylvania corporation,

24 Cross-complainant,

25 v.

26 FIREMAN'S FUND INSURANCE
27 COMPANY, a California corporation,
28 INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation, and
Roes 1 through 10, inclusive,

Cross-defendants.

Action No.: C 07-04943 JL

AMENDED ANSWER AND
COUNTERCLAIM OF UNITED NATIONAL
INSURANCE COMPANY.

DEMAND FOR JURY TRIAL.

ANSWER TO COMPLAINT

Defendant United National Insurance Company, in answer to the complaint filed by plaintiff Fireman's Fund Insurance Company, admits, denies, and alleges as follows:

1. Responding to the allegations in paragraph 1 of the complaint, United National admits and alleges that plaintiff makes the contentions set forth in paragraph 1 of the complaint. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 1 of the complaint.

2. Responding to the allegations in paragraph 2 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

3. Responding to the allegations in paragraph 3 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 3 of the complaint.

4. Responding to the allegations contained in paragraph 4 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

5. Responding to the allegations in paragraph 5 of the complaint, United National admits and alleges that it is a Pennsylvania corporation and that it is authorized to and sells insurance policies on a surplus-lines basis in the State of California. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 5 of the complaint.

6. Responding to the allegations in paragraph 6 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 6 of the complaint.

7. Responding to the allegations contained in paragraph 7 of the complaint, United National admits and alleges that it issued to named insured Cirrus Medical Staffing LLC, a policy of claims-made-and-reported professional liability insurance effective from January 27, 2006, to

1 January 26, 2007, with policy number AH-0000267 (the "United National policy") and that the
2 United National policy sets forth to various terms, conditions, exclusions, and dollar limits of
3 liability, all of which speak for themselves. Except as so admitted and alleged, United National
4 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
5 every, and all of the allegations contained in paragraph 7 of the complaint.

6 8. Responding to the allegations in paragraph 8 of the complaint, United National is
7 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*
8 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in
9 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number
10 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted
11 and alleged, United National lacks sufficient knowledge, information or belief to respond to and
12 on that basis denies each, every, and all of the allegations contained in paragraph 8 of the
13 complaint.

14 9. Responding to the allegations in paragraph 9 of the complaint, United National is
15 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*
16 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in
17 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number
18 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted
19 and alleged, United National lacks sufficient knowledge, information or belief to respond to and
20 on that basis denies each, every, and all of the allegations contained in paragraph 9 of the
21 complaint.

22 10. Responding to the allegations in paragraph 10 of the complaint, United National is
23 informed and believes and on that basis admits and alleges that a lawsuit styled *Tracy v. Lovelace*
24 *Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in the State of
25 New Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005
26 07009, the documents of which speak for themselves. Except as so admitted and alleged, United
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
28 each, every, and all of the allegations contained in paragraph 10 of the complaint.

1 11. Responding to the allegations in paragraph 11 of the complaint, United National is
2 informed and believes, and on that basis admits and alleges, that Interstate Fire & Casualty
3 Company defended Cirrus Medical Services LLC in the *Tracy* action. Except as so admitted and
4 alleged, United National lacks sufficient knowledge, information or belief to respond to and on
5 that basis denies each, every, and all of the allegations contained in paragraph 11 of the
6 complaint.

7 12. Responding to the allegations in paragraph 12 of the complaint, United National
8 admits and alleges that it received notice of the *Tracy* action and that United National issued a
9 letter dated October 6, 2006, which speaks for itself, advising that United National would not
10 defend Cirrus in the *Tracy* action, and reserving United National's rights to disclaim coverage for
11 the *Tracy* action under the United National policy. Except as so admitted and alleged, United
12 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
13 each, every, and all of the allegations contained in paragraph 12 of the complaint.

14 13. Responding to the allegations in paragraph 13 of the complaint, United National
15 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
16 every, and all of the allegations contained in paragraph 13 of the complaint.

17 14. Responding to the allegations in paragraph 14 of the complaint, United National
18 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself, advising
19 that United National had determined that there was no coverage under the United National policy
20 for the *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a
21 claim first made and reported during Interstate Fire & Casualty Company's immediately
22 preceding policy period, and stating that United National continued to reserve all of its rights
23 under the policy. Except as so admitted and alleged, United National lacks sufficient knowledge,
24 information or belief to respond to and on that basis denies each, every, and all of the allegations
25 contained in paragraph 14 of the complaint.

26 15. Responding to the allegations contained in paragraph 15 of the complaint, United
27 National lacks sufficient knowledge, information or belief to respond and on that basis denies
28 each, every, and all of the allegations contained in paragraph 15 of the complaint.

1 16. Responding to the allegations in paragraph 16 of the complaint, United National
2 admits and alleges that the United National policy includes, without the added italics, the policy
3 language quoted in paragraph 16. Except as so admitted and alleged, United National lacks
4 sufficient knowledge, information or belief to respond to and on that basis denies each, every, and
5 all of the allegations contained in paragraph 16 of the complaint.

6 17. Responding to the allegations in paragraph 17 of the complaint, United National
7 denies each, every, and all of the allegations contained in paragraph 17 of the complaint.

8 18. Responding to the allegations in paragraph 18 of the complaint, United National
9 admits and alleges that the United National policy speaks for itself. Except as so admitted and
10 alleged, United National lacks sufficient knowledge, information or belief to respond to and on
11 that basis denies each, every, and all of the allegations contained in paragraph 18 of the
12 complaint.

13 19. Responding to the allegations in paragraph 19 of the complaint, United National
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
15 and all of the allegations contained in paragraph 19 of the complaint.

16 20. Responding to the allegations in paragraph 20 of the complaint, United National
17 admits and alleges that the United National policy, which speaks for itself, includes the policy
18 language quoted in paragraph 20, although the quoted language is set forth in a larger paragraph
19 that has been omitted from paragraph 20. Except as so admitted and alleged, United National
20 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
21 every, and all of the allegations contained in paragraph 20 of the complaint.

22 21. Responding to the allegations in paragraph 21 of the complaint, United National
23 admits and alleges that the United National policy, which speaks for itself, includes the policy
24 language quoted in paragraph 21, although the quoted language is set forth in a larger paragraph
25 that has been omitted from paragraph 21. Except as so admitted and alleged, United National
26 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
27 every, and all of the allegations contained in paragraph 21 of the complaint.

28 22. Responding to the allegations in paragraph 22 of the complaint, United National

1 admits and alleges that the United National policy speaks for itself. Except as so admitted and
2 alleged, United National denies each, every, and all of the allegations contained in paragraph 22
3 of the complaint.

4 23. Responding to the allegations in paragraph 23 of the complaint, United National
5 denies each, every, and all of the allegations contained in paragraph 23 of the complaint.

6 24. Responding to the allegations in paragraph 24 of the complaint, United National
7 denies each, every, and all of the allegations contained in paragraph 24 of the complaint.

8 25. Responding to the allegations in paragraph 25 of the complaint, United National
9 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
10 and all of the allegations contained in paragraph 25 of the complaint.

11 26. Responding to the allegations in paragraph 26 of the complaint, United National
12 admits and alleges that it contributed \$100,000 on behalf of Cirrus to settle the *Tracy* action.
13 Except as so admitted and alleged, United National lacks sufficient knowledge, information or
14 belief to respond and on that basis denies each, every, and all of the allegations contained in
15 paragraph 26 of the complaint.

16 27. Responding to the allegations in paragraph 27 of the complaint, United National
17 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
18 and all of the allegations contained in paragraph 27 of the complaint.

19 28. Responding to the allegations in paragraph 28 of the complaint, United National
20 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

21 29. Responding to the allegations in paragraph 29 of the complaint, United National
22 admits and alleges that Fireman's Fund contends that United National had a duty to defend
23 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse
24 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United
25 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United
26 National contends that it has no obligation to reimburse Fireman's Fund of Interstate for any of
27 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United
28 National lacks sufficient knowledge, information or belief to respond to and on that basis denies

each, every, and all of the allegations contained in paragraph 29 of the complaint.

30. Responding to the allegations in paragraph 30 of the complaint, United National admits and alleges that Fireman's Fund contends that United National had a duty to defend Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United National lacks sufficient knowledge, information or belief to respond to and on that basis denies each, every, and all of the allegations contained in paragraph 30 of the complaint.

31. Responding to the allegations in paragraph 31 of the complaint, United National admits and alleges that Fireman's Fund contends that United National had a duty to defend Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United National lacks sufficient knowledge, information or belief to respond to and on that basis denies each, every, and all of the allegations contained in paragraph 31 of the complaint.

32. Responding to the allegations in paragraph 32 of the complaint, United National admits and alleges that Fireman's Fund contends that United National had a duty to defend Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United National lacks sufficient knowledge, information or belief to respond to and on that basis denies each, every, and all of the allegations contained in paragraph 32 of the complaint.

1 33. Responding to the allegations in paragraph 33 of the complaint, United National
2 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

3 34. Responding to the allegations in paragraph 34 of the complaint, United National
4 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
5 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
6 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
7 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
8 the *Tracy* action, and that United National contends that it has no obligation to reimburse
9 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to
10 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
11 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
12 each, every, and all of the allegations contained in paragraph 34 of the complaint.

13 35. Responding to the allegations in paragraph 35 of the complaint, United National
14 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
15 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
16 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
17 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
18 the *Tracy* action, and that United National contends that it has no obligation to reimburse
19 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to
20 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
21 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
22 each, every, and all of the allegations contained in paragraph 35 of the complaint.

23 36. Responding to the allegations in paragraph 36 of the complaint, United National
24 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
25 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
26 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
27 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
28 the *Tracy* action, and that United National contends that it has no obligation to reimburse

1 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to
2 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
3 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
4 each, every, and all of the allegations contained in paragraph 36 of the complaint.

5 37. Responding to the allegations in paragraph 37 of the complaint, United National
6 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
7 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
8 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
9 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
10 the *Tracy* action, and that United National contends that it has no obligation to reimburse
11 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to
12 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
13 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
14 each, every, and all of the allegations contained in paragraph 37 of the complaint.

15 38. Responding to the allegations in paragraph 38 of the complaint, United National
16 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

17 39. Responding to the allegations in paragraph 39 of the complaint, United National
18 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
19 and all of the allegations contained in paragraph 39 of the complaint.

20 40. Responding to the allegations in paragraph 40 of the complaint, United National
21 admits and alleges that it issued to Cirrus as named insured a policy of claims-made-and-reported
22 professional liability insurance referenced in paragraph 7 of this answer. Except as so admitted
23 and alleged, United National lacks sufficient knowledge, information or belief to respond to and
24 on that basis denies each, every, and all of the allegations contained in paragraph 40 of the
25 complaint.

26 41. Responding to the allegations in paragraph 41 of the complaint, United National
27 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,
28 advising that United National had determined that there was no coverage under the Untied

1 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to
2 constitute a claim first made and reported during Interstate Fire & Casualty Company's
3 immediately preceding policy period, and stating that United National continued to reserve all
4 of its rights under the policy. Except as so admitted and alleged, United National lacks
5 sufficient knowledge, information or belief to respond to and on that basis denies each, every,
6 and all of the allegations contained in paragraph 41 of the complaint.

7 42. Responding to the allegations in paragraph 42 of the complaint, United National
8 denies each, every, and all of the allegations contained in paragraph 42 of the complaint.

9 43. Responding to the allegations in paragraph 43 of the complaint, United National
10 denies each, every, and all of the allegations contained in paragraph 43 of the complaint.

11 44. Responding to the allegations in paragraph 44 of the complaint, United National
12 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

13 45. Responding to the allegations in paragraph 45 of the complaint, United National
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each,
15 every, and all of the allegations contained in paragraph 45 of the complaint.

16 46. Responding to the allegations contained in paragraph 46 of the complaint, United
17 National admits and alleges that it issued to Cirrus as named insured a policy of claims-made-
18 and-reported professional liability insurance referenced in paragraph 7 of this answer. Except as
19 so admitted and alleged, United National lacks sufficient knowledge, information or belief to
20 respond to and on that basis denies each, every, and all of the allegations contained in paragraph
21 46 of the complaint.

22 47. Responding to the allegations in paragraph 47 of the complaint, United National
23 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,
24 advising that United National had determined that there was no coverage under the United
25 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to
26 constitute a claim first made and reported during Interstate Fire & Casualty Company's
27 immediately preceding policy period, and stating that United National continued to reserve all
28 of its rights under the policy. Except as so admitted and alleged, United National lacks

1 sufficient knowledge, information or belief to respond to and on that basis denies each, every,
2 and all of the allegations contained in paragraph 47 of the complaint.

3 48. Responding to the allegations in paragraph 48 of the complaint, United National
4 denies each, every, and all of the allegations contained in paragraph 48 of the complaint.

5 49. Responding to the allegations in paragraph 49 of the complaint, United National
6 denies each, every, and all of the allegations contained in paragraph 49 of the complaint.

7 50. Responding to the allegations in paragraph 50 of the complaint, United National
8 admits and alleges that plaintiff makes the contentions set forth in paragraph 50 of the complaint.
9 Except as so admitted, United National lacks sufficient knowledge, information or belief to
10 respond and on that basis denies each, every, and all of the allegations contained in paragraph 50
11 of the complaint.

12 51. Responding to the allegations in paragraph 51 of the complaint, United National
13 incorporates by reference paragraphs 1 through 28 of this answer as though fully set forth here.

14 52. Responding to the allegations in paragraph 52 of the complaint, United National
15 admits and alleges that plaintiff makes the contentions set forth in paragraph 52 of the complaint.
16 Except as so admitted, United National lacks sufficient knowledge, information or belief to
17 respond and on that basis denies each, every, and all of the allegations contained in paragraph 52
18 of the complaint.

19 53. Responding to the allegations in paragraph 53 of the complaint, United National
20 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
21 and all of the allegations contained in paragraph 53 of the complaint.

22 54. Responding to the allegations in paragraph 54 of the complaint, United National
23 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
24 and all of the allegations contained in paragraph 54 of the complaint.

25 55. Responding to the allegations in paragraph 55 of the complaint, United National
26 admits and alleges that it issued a letter dated October 6, 2006, which speaks for itself, advising
27 that United National would not defend Cirrus in the *Tracy* action, and reserving United
28 National's rights to disclaim coverage for the *Tracy* action. United National further admits and

1 alleges that it issued a letter dated February 13, 2007, which speaks for itself, advising that United
2 National had determined that there was no coverage under the United National policy for the
3 *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a claim first
4 made and reported during Interstate Fire & Casualty Company's immediately preceding policy
5 period, and stating that United National continued to reserve all of its rights under the policy.
6 Except as so admitted, United National lacks sufficient knowledge, information or belief to
7 respond and on that basis denies each, every, and all of the allegations contained in paragraph 55
8 of the complaint.

9 56. Responding to the allegations in paragraph 56 of the complaint, United National
10 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
11 and all of the allegations contained in paragraph 56 of the complaint.

12
13 United National further alleges the following affirmative defenses:

14 1. As and for a first, separate defense, United National alleges that the complaint and
15 each claim therein do not state facts sufficient to constitute a cause of action against United
16 National.

17 2. As and for a second, separate defense, United National alleges that the plaintiff
18 lacks standing to bring this action.

19 3. As and for a third, separate defense, United National alleges that the complaint and
20 each cause of action in it are barred by the terms, provisions, conditions, limitations, and
21 exclusions of the alleged United National policy. United National reserves the right to amend its
22 answer to the Complaint to assert any additional defenses arising from the terms of the alleged
23 United National insurance policy, and/or applicable insurance policy terms, provisions,
24 conditions, limitations, and exclusions as may become apparent during the continuing course of
25 discovery in this action.

26 4. As and for a fourth, separate defense, United National alleges that the complaint
27 and each cause of action in it are barred by the terms, provisions, conditions, limitations, and
28 exclusions of a policy of liability insurance issued by Interstate Fire & Casualty Company, policy

number ASC-1000204, to named insured Cirrus Medical Staffing, LLC, for the policy period January 27, 2005, to January 27, 2006. United National reserves the right to amend its answer to the Complaint to assert any additional defenses arising from the terms of the alleged Interstate insurance policy, and/or applicable insurance policy terms, provisions, conditions, limitations, and exclusions as may become apparent during the continuing course of discovery in this action.

Wherefore United National prays for judgment as follows:

1. That the Court deny plaintiff's prayers for judicial declarations set forth in the complaint;
2. That plaintiff take nothing by its complaint;
3. That United National be awarded its costs of suit incurred herein;
4. That United National be awarded its attorneys fees;
3. For such other and further relief as the Court deems just and proper.

**COUNTERCLAIM AGAINST FIREMANS' FUND INSURANCE COMPANY,
INTERSTATE FIRE & CASUALTY COMPANY, AND ROES 1 THROUGH 10**

Counterclaimant United National Insurance Company, for its counterclaim against counterdefendants Fireman's Fund Insurance Company, Interstate Fire & Casualty Company, and Roes 1 through 10, inclusive, alleges as follows:

GENERAL ALLEGATIONS

1. At all times herein mentioned, United National was and is a Pennsylvania corporation with its principal place of business in Bala Cynwyd, Pennsylvania.

2. United National is informed and believes and thereon alleges that counterdefendant Fireman's Fund Insurance Company is a California corporation with its principal place of business in Novato, California.

1 3. United National is informed and believes and thereon alleges that
2 counterdefendant Interstate Fire & Casualty Company is an Illinois corporation, doing business in
3 California, with its principal place of business in Chicago, Illinois.

4 4. United National is unable to ascertain the true names and identities of those
5 counterdefendants designated as Roes 1 through 10, inclusive. United National will ask leave of
6 Court to amend this complaint and all subsequent pleadings to insert the true names and
7 capacities of these fictitiously named counterdefendants when ascertained. The allegations and
8 controversies alleged below with respect to the named counterdefendants Fireman's Fund and
9 Interstate apply equally to Roes 1 through 10.

10 5. Jurisdiction over United National's counterclaim is conferred by 28 U.S.C. §
11 1367(a).

12 6. Venue is proper in this Court under 28 U.S.C. § 1391(a)(1), because
13 counterdefendant Fireman's Fund is a resident of this district.

14 7. United National is informed and believes, and on that basis alleges, that Cirrus
15 Medical Staffing LLC was sued in underlying litigation styled *Tracy v. Lovelace Sandia Health*
16 *Services dba Albuquerque Regional Medical Center et al.*, which was filed in the State of New
17 Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005 07009.
18 United National is informed and believes, and on that basis alleges, that the *Tracy* action was a
19 medical-malpractice action that was filed on or about September 14, 2005.

20 8. United National is informed and believes, and on that basis alleges, that the
21 complaint in the *Tracy* action alleges, at paragraph 6, that Cathy Robinson R.N., "negligently
22 failed to monitor Marilyn Tracy's fluid status, negligently failed to respond to worsening vital
23 signs and negligently failed to appropriately notify the physician on call that Marilyn Tracy's
24 status was not improving. In addition, the nurses negligently failed to continue to monitor
25 Marilyn Tracy, despite her worsening condition, such that she was allowed to deteriorate, become
26 unresponsive, apneic, go into asystole and code." United National is informed and believes, and
27 on that basis alleges, that the complaint in the *Tracy* action alleges that Marilyn Tracy was
28 pronounced dead on October 7, 2004.

1 9. United National is informed and believes, and on that basis alleges, that on
2 January 4, 2006, attorney Ellen Thorne Skark, counsel for defendant Lovelace Sandia in the
3 *Tracy* action, faxed a letter to Cirrus forwarding the *Tracy* complaint and stating that plaintiff's
4 counsel in the *Tracy* action "has expressed the intention to bring you into the case." United
5 National is informed and believes, and on that basis alleges, that Skark's letter also stated, "[y]our
6 nurse, Cathy Robinson, was one of the nurses who cared for Mrs. Tracy prior to her death."

7 10. United National is informed and believes, and on that basis alleges, that Cirrus
8 notified Robert P. Watson of the Watson Insurance Agency, Inc., about Skrak's letter and the
9 *Tracy* complaint, and that Watson, on January 5, 2006, prepared a "General Liability Notice of
10 Occurrence/Claim" form listing Interstate policy number ASC1000204 and stating "See attached
11 letter received by insured regarding medical malpractice issue." United National is informed and
12 believes, and on that basis alleges, that Terry Bellotti of Health Care Insurers sent an e-mail to
13 Interstate on January 6, 2006, forwarding the form prepared by Watson, Skrak's letter, and the
14 *Tracy* complaint, and stating "please see attached notice of claim and letter from a lawyer office."

15 11. United National is informed and believes, and on that basis alleges, that on
16 January 10, 2006, Skrak sent a fax to Jennifer Beran of Interstate forwarding a copy of Skrak's
17 January 4, 2006, letter to Cirrus and the complaint in the *Tracy* action.

18 12. United National is informed and believes, and on that basis alleges, that the first-
19 amended complaint in the *Tracy* action alleges, at paragraph 3, that Cirrus employee Cathy
20 Robinson was a "healthcare provider[] who treated Marilyn Tracy," the decedent whose death
21 was the subject of the *Tracy* action. United National is informed and believes, and on that basis
22 alleges, that the first amended complaint further alleges, at paragraph 28, that Cirrus "acting
23 through its employee, agent and/or apparent agent or contractor, Cathy Robinson, RN, negligently
24 failed to inform the physician on call of Marilyn Tracy's status," as a result of which, according
25 to paragraph 23, Marilyn Tracy was pronounced dead on October 7, 2004.

26 13. United National is informed and believes, and on that basis alleges, that N.M. Stat.
27 Ann. § 41-5-15 provides as follows:
28

1 A. No malpractice action may be filed in any court against a qualifying health
2 care provider before application is made to the medical review commission
3 and its decision is rendered.

4
5 B This application shall contain the following:

6
7 (1) a brief statement of the facts of the case, naming the persons
8 involved, the dates and the circumstances, so far as they are known,
9 of the alleged act or acts of malpractice; and

10
11 (2) a statement authorizing the panel to obtain access to all medical and
12 hospital records and information pertaining to the matter giving rise
13 to the application, and, for the purposes of its consideration of the
14 matter only, waiving any claim of privilege as to the contents of
15 those records. Nothing in that statement shall in any way be
16 construed as waiving that privilege for any other purpose or in any
17 other context, in or out of court.

18
19 14. United National is informed and believes, and on that basis alleges, that N.M. Stat.
20 Ann. § 41-5-16 provides as follows:

21
22 A. Upon receipt of an application for review, the commission's director or his
23 delegate shall cause to be served a true copy of the application on the
24 health care providers involved. Service shall be effected pursuant to New
25 Mexico law. If the health care provider involved chooses to retain legal
26 counsel, his attorney shall informally enter his appearance with the
27 director.

1 B The health care provider shall answer the application for review and in
 2 addition shall submit a statement authorizing the panel to obtain access to
 3 all medical and hospital records and information pertaining to the matter
 4 giving rise to the application, and, for the purposes of its consideration of
 5 the matter only, waiving any claim of privilege as to the contents of those
 6 records. Nothing in that statement shall in any way be construed as
 7 waiving that privilege for any other purpose or in any other context, in or
 8 out of court.

9
 10 C. In instances where applications are received employing the theory of
 11 respondeat superior or some other derivative theory of recovery, the
 12 director shall forward such applications to the state professional societies,
 13 associations or licensing boards of both the individual health care provider
 14 whose alleged malpractice caused the application to be filed, and the health
 15 care provider named a respondent as employer, master or principal.

16
 17 15. United National is informed and believes, and on that basis alleges, that Interstate
 18 and Roes 1 through 10 issued to Cirrus as named insured a policy of liability insurance, number
 19 ASC-10000204, effective for the policy period January 27, 2005, to January 27, 2006. United
 20 National is informed and believes, and on that basis alleges, that the Interstate policy generally
 21 provides liability coverage to Cirrus on a claims-made-and-reported basis subject to limits of
 22 \$1,000,000 for each incident and \$3,000,000 in the aggregate.

23 16. United National is informed and believes, and on that basis alleges, that the
 24 Interstate policy sets forth the following language in Form 01-PL-4002 (03/04):

25 I. COVERAGE.

26 The Company will pay on behalf of the Insured all sums which the
 27 **Insured** shall become legally obligated to pay as **Damages for Claims**
 28 first made against the Insured and reported to the Company during the

Policy Period, as a result of **Bodily Injury, Property Damages** or **Personal Injury** caused by an **incident**, provided always that such **incident** happens:

- A. on or after the policy effective date shown on the Declarations; or
- B. at any time prior to the policy effective date shown on the Declarations if;
 - 1. such **incident** happens on or subsequent to the "prior acts date" on the Declarations, and
 - 2. no **insured** knew or could have reasonably foreseen that such **incident** might be expected to be the basis of a **Claim** or **Suit** on the effective date of this policy.

The Company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as **Damages** to which this insurance applies and the Company shall have the right and duty to defend any **Suit** against the **Insured** seeking **Damages** on account of such **Bodily Injury, Property Damage** or **Personal Injury**, even if any of the allegations of the **Suit** are groundless, false or fraudulent, but the Company shall not be obligated to pay any **Claims** or **Claims Expenses** or judgments or continue to defend any **Suit** after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

* * *

VI. WHEN **CLAIM** IS CONSIDERED AS FIRST MADE

A **Claim** shall be considered as being first made when the Company first receives written notice from the **Insured** advising that a **Claim** has been made and providing the details of the **Claim**.

All **Claims** arising out of the same or related **incident** shall be considered as having been made at the item the first such **Claim** is made, and shall be

1 subject to the same limit of liability and only a single deductible, if any,
2 shall apply.

3 * * *

4 IX. DEFINITIONS

5 When used in this policy (including endorsement forming a part hereof):

6
7 **"Bodily Injury"** means bodily injury, sickness or disease, mental anguish,
8 psychological injury or emotional distress sustained by any person,
9 including death at any time resulting therefrom;

10
11 **"Claim"** means a demand for money or the filing of **Suit** naming the
12 **Insured** and, in either case, alleging a **Bodily Injury, Property Damage**
13 or **Personal Injury** as a result of an **Incident**.

14 * * *

15 **"Damages"** means compensatory judgments, settlement or awards but
16 does not include punitive or exemplary **Damages**, fines or penalties, the
17 return of fees or other consideration paid to the **insured**, or the portion of
18 any award or judgment caused by the multiplication of actual **Damages**
19 under federal or state law. However, if a **Suit** is brought against the
20 **Insured** with respect to a **Claim** for alleged acts or omissions falling
21 within the scope of coverage afforded by this insurance seeking both
22 compensatory and punitive or exemplary **Damages**, then the Company will
23 afford a defense to such action, without liability however, for payment of
24 such punitive or exemplary damages;

25 * * *

26 **"Incident"** means any act or omission in the rendering of or failure to
27 render services by the **Insured**, or by any person for whom the **Insured** is
28 legally responsible, in the conduct of the business or professional

1 occupation specified in the Declarations.

2 Any such act or omission together with all related acts or omissions shall
3 be considered one **"Incident"** and be subject to the same limit of liability;

4 * * *

5 **"Suit"** means a civil proceeding in which **Damages** because of **Bodily**
6 **Injury, Property Damage or Personal Injury** to which this insurance
7 applies are alleged. **"Suit"** includes:

- 8 A. an arbitration proceeding in which such **Damages** are claimed and
9 to which the **insured** must submit or does submit with the
10 Company's consent; or
11 B. any other alternative dispute resolution proceeding in which such
12 **Damages** are claimed and to which the **Insured** submits with the
13 Company's consent.

14 17. United National issued to Cirrus as named insured a claims-made-and-reported
15 professional liability insurance policy effective from January 27, 2006, to January 26, 2007, with
16 policy number AH-0000267 (the "United National policy")

17 18. The United National policy states as follows:

18 [From Form CPA-119(2.2005):]

19 **SECTION I—PROFESSIONAL LIABILITY COVERAGE**

20 **1. Insuring Agreement**

21 We will pay those sums that the insured becomes legally obligated to pay
22 as "compensatory damages" as a result of a "wrongful act." This insurance
23 applies to injury only if a "claim" for damages to which no other insurance
24 applies, because of the injury is first made against the insured and reported
25 to us during the "policy period." This insurance does not apply to injury
26 caused by a "wrongful act" that takes place outside of the "covered
27 territory" or was committed before the Retroactive Date shown in the
28 Declarations or after the "policy period."

- 1 a. A "claim" by a person or organization seeking damages will be
2 deemed to have been made when notice of such "claim" is received
3 and recorded by the insured or by us, which ever comes first;

4 * * *

- 5 c. We will have the right and duty to select counsel and to defend any
6 "suit" seeking damages. However, we will have no duty to defend
7 the insured against any "suit" seeking damages for injury to which
8 this insurance does not apply

9 * * *

10 **2. Exclusions**

11 This insurance does not apply to:

12 * * *

- 13 s. Any "claim," "suit," or "wrongful act" that might result in a
14 "claim" or "suit," of which any insured had knowledge or could
15 have reasonably foreseen, at the signing date of the application for
16 this insurance.

17 * * *

18 **SECTION V—PROFESSIONAL LIABILITY CONDITIONS**

19 * * *

20 **4. Other Insurance**

21 If other valid and collectible insurance with any other insurer is available to
22 the insured covering a "claim" also covered hereunder (except insurance
23 purchased to apply in excess of the limit of liability hereunder), this
24 insurance will be excess of, and not contribute with, such insurance. If the
25 insured has other coverage with us covered a "claim" also covered by this
26 policy or coverage Part, the insured must elect which policy or Coverage
27 Part will apply and we will be liable under the Coverage Part so elected
28 and will not be liable under any other policy or Coverage Part.

* * *

5. **Representations**

By accepting this policy, you agree:

- a. The statements in the Declarations and application, made part of this policy, are accurate and complete;
- b. Those statements are based upon representations you made to us;
- c. We have issued this policy in reliance upon your representations; and
- d. This policy embodies all of the agreements existing between you and us or any of our agents relating to this insurance.

* * *

SECTION VI—DEFINITIONS

* * *

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Claim" means a written demand upon the insured for "compensatory damages," including, but not limited to, the service of "suit" or institution of arbitration proceedings against the insured. "Claim" includes reports of accidents, acts, errors, occurrences, offenses or omissions which may give rise to a "claim" under this policy. "Claims" based on or arising out of the same act or interrelated acts of one or more insured will be considered to be based on a single "wrongful act."

* * *

11. "Suit" means a civil proceeding in which damages for injury to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.
12. "Wrongful act" means any act, error or omission in the furnishing of

professional social services. It includes the furnishing of food, beverages, medications or appliances in connection with those services. All "wrongful acts" committed in the furnishing of professional social services to any one person will be considered one "wrongful act." All interrelated "wrongful acts" of one or more insured will be considered one "wrongful act."

[From Form EPA-909 (5/2006):]

This endorsement modifies insurance provided under the following:

PROFESSIONAL LIABILITY COVERAGE PART

Paragraph 12. of SECTION VI.—DEFINITIONS is deleted and replaced by the following:

12. "Wrongful act" means:

- a. any act or omission in the furnishing of healthcare services to a patient or client including the furnishing of food, beverages, medications, medical treatment or appliances in connection with such services and the postmortem handling of human bodies.
- b. All "wrongful acts" committed in the furnishing of services to any one patient or client will be considered one "wrongful act." All interrelated "wrongful acts" of one or more insured will be considered one "wrongful act."

19. United National is informed and believes, and on that basis alleges, that Interstate and/or Fireman's Fund agreed to defend and indemnify Cirrus in connection with the *Tracy* pursuant to the terms and provisions of the Interstate policy.

FIRST CLAIM FOR DECLARATORY JUDGMENT—DUTY TO DEFEND

20. United National incorporates by reference the allegations of paragraphs 1-15 of

1 this counterclaim.

2 21. An actual controversy has arisen and now exists between United National,
3 Fireman's Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties
4 under the Interstate and United National policies regarding the underlying *Tracy* action. United
5 National contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were
6 required to defend Cirrus in connection with the *Tracy* action, and that United National had no
7 obligation to defend Cirrus in connection with the *Tracy* action. On the other hand, United
8 National is informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and
9 Roes 1 through 10, contend that they had no obligation to defend Cirrus in the *Tracy* action and
10 that United National alone was obligated to defend Cirrus in the *Tracy* action, or, alternately, that
11 Fireman's Fund, Interstate, and United National were jointly obligated to defend Cirrus in
12 connection with the *Tracy* action. United National requests this Court to make and enter its
13 binding judicial declarations in accordance with United National's contentions set forth in this
14 paragraph. The requested declarations are both necessary and proper at this time under the
15 circumstances in that the interest of judicial economy and substantial justice will be served
16 thereby.

17
18 SECOND CLAIM FOR DECLARATORY JUDGMENT—DUTY TO INDEMNIFY

19 22. United National incorporates by reference the allegations of paragraphs 1-15 of
20 this counterclaim

21 23. An actual controversy has arisen and now exists between United National, Fireman's
22 Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties under the
23 Interstate and United National policies regarding the underlying *Tracy* action. United National
24 contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were required to
25 indemnify Cirrus in connection with the *Tracy* action, and that United National had no obligation
26 to indemnify Cirrus in connection with the *Tracy* action. On the other hand, United National is
27 informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and Roes 1
28 through 10, contend that they had no obligation to indemnify Cirrus in the *Tracy* action and that

United National alone was obligated to indemnify Cirrus in the *Tracy* action, or, alternately, that Fireman's Fund, Interstate, and United National were jointly obligated to indemnify Cirrus in connection with the *Tracy* action. United National requests this Court to make and enter its binding judicial declarations in accordance with United National's contentions set forth in this paragraph. The requested declarations are both necessary and proper at this time under the circumstances in that the interest of judicial economy and substantial justice will be served thereby.

24. If the Court enters a judicial declaration in accordance with United National's contentions set forth in the preceding paragraph, United National is entitled to recover from defendants Fireman's Fund, Interstate, and Roes 1 through 10, or any of them, \$100,000, plus prejudgment interest under Cal. Civ. Code §§ 3287(a) and 3289(b), to reimburse United National for its contribution toward the settlement of the *Tracy* action.

WHEREFORE, United National prays for judgment as follows:

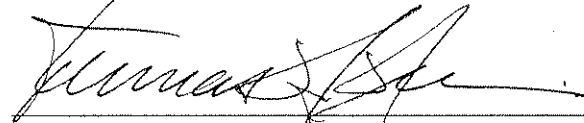
- a. That the Court make and enter a binding judicial declaration of the parties' respective rights and duties in accordance with United National's contentions set forth in paragraph 17 above,
- b. That the Court make and enter a binding judicial declaration of the parties' respective rights and duties in accordance with United National's contentions set forth in paragraph 19 above,
- c. That the Court order and enter a money judgment requiring counterdefendants Fireman's Fund, Interstate, Roes 1 through 10, and any of the them, to reimburse United National \$100,000, plus prejudgment interest under Cal. Civ. Code §§3287(a) and 3289(b), for the money it contributed to settlement of the *Tracy* action.
- d. That United National be awarded its costs of suit incurred herein; and
- e. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

NIELSEN, HALEY & ABBOTT LLP

Dated: June 2, 2008

By:



Thomas H. Nienow

Attorneys for Defendant and Counterclaimant
UNITED NATIONAL INSURANCE COMPANY

DEMAND FOR JURY TRIAL

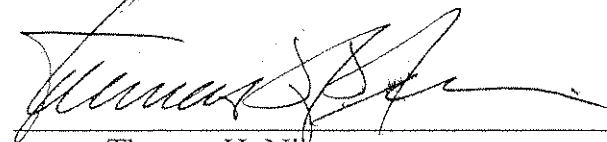
Defendant and counterclaimant United National Insurance Company demands trial by jury in this action.

Respectfully submitted,

NIELSEN, HALEY & ABBOTT LLP

Dated: June 2, 2008

By:



Thomas H. Nienow

Attorneys for Defendant and Counterclaimant
UNITED NATIONAL INSURANCE COMPANY

Exhibit 6

From: Thomas Nienow
To: Christopher J. Borders
Date: 6/5/2008 4:42:39 PM
Subject: Re: Interstate v. UNIC: Proposed Amended Counter claim; our file 3701-448

Chris:

Thank you for your comments. I looked again at the transmission dates on the various faxes your office produced and I have modified paragraphs 8-11 of the amended counterclaim accordingly. The updated amended answer and counterclaim is attached below. Paragraph 7 was not modified from the original counterclaim and is an accurate statement of facts that was not changed by the documents that your firm produced to us.

I've attached an updated stipulation below. Please return your signature to me by Monday June 9 if you agree that United National may file the amended pleading.

I will forward a proposed draft joint statement of facts to you shortly.

Tom

Tom Nienow
(415) 248-0164

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>>> "Christopher J. Borders" <CBorders@hinshawlaw.com> 6/4/2008 9:46 AM >>>

Tom -

I received your June 2 fax with the proposed amended counterclaim. If you feel the need to include these other facts than Interstate will stipulate, provided you are open to making some corrections.

Paragraph 8 inserts the name of the insured's employee before you begin the quote, implying to me that the complaint so names her as responsible for the allegations you quote. As you will see, the underlying complaint allegation lumps all nurses, therapists and health care providers together without naming any specifically, and only refers to "C. Robinson" and not Cathy Robinson. I would ask that you revise this paragraph to state what the complaint states: that "C. Robinson" is listed in paragraph 4 as one of several nurses attending to the deceased, and that paragraph 6 alleges that "the nursing staff, respiratory therapists and/or other health care providers negligently failed [etc.]..."

Paragraph 10 states at line 14 that Mr. Bellotti's January 6 email included a copy of the underlying complaint. The email (IFC 00450) does not say this, and the complaint is not an attachment to Ms. Shrak's letter

that he did forward. A copy of the complaint in our file has a fax legend for January 5, and it appears that Greg Allen may have been sent a copy by Ms. Skrak on that day. But we do not see any record that Mr. Bellotti received a copy, and no record that Interstate received a copy before January 10. So I believe that the reference to the complaint in line 14 should be removed.

Paragraph 11 asserts that both a copy of the complaint and Ms. Skrak's letter was forwarded to Interstate on January 10. Again, the January 10 fax cover page (IFC 00451) only refers to the complaint. I do not see any document sending Ms. Beran a copy of Ms. Skrak's letter; it seems that only Mr. Bellotti's email included that letter. So I would ask that this paragraph be revised to remove the reference to Ms. Skrak's letter.

Also, since you are working on making your counterclaim more detailed and accurate, I also ask that paragraph 7 be revised. That paragraph states in the first sentence that Cirrus was a defendant in the underlying action and in the final sentence that the action was filed September 14, 2005, implying in my view that Cirrus was a defendant in 2005. I think that it would be more reasonable to revise this to state the accurate facts more clearly - that the action was filed in September 2005 not naming Cirrus or any Cirrus employee, and that Cirrus was added as a Doe defendant on March 21, 2006.

These issues overlap somewhat with the Joint Stipulation of Facts. We are happy to have these facts included in the stipulation if stated accurately and in chronological order. I would like to come to agreement on the Joint Stipulation this week given that we both need to determine what contested facts may need to be addressed in our summary judgment motions.

Please call or email with your thoughts. I will be in the office all week.

Chris

Christopher J. Borders
Hinshaw & Culbertson LLP
One California Street
18th Floor
San Francisco, CA 94111
(415) 393-0124 (direct)
(415) 362-6000 (main)
(415) 834-9070 (facsimile)
cborders@hinshawlaw.com

<p style="font-family: 'Times New Roman', Times, serif; font-size: 10pt;">

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Exhibit 7

1 JAMES C. NIELSEN (111889)
2 *jnielsen@nielsenhaley.com*
3 THOMAS H. NIENOW (136454)
4 *tnienow@nielsenhaley.com*
5 NIELSEN, HALEY & ABBOTT LLP
6 44 Montgomery Street, Suite 750
7 San Francisco, California 94104
8 Telephone: (415) 693-0900
9 Facsimile: (415) 693-9674

10 Attorneys for Defendant and Counterclaimant
11 UNITED NATIONAL INSURANCE COMPANY

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO/OAKLAND DIVISION

15 FIREMAN'S FUND INSURANCE
16 COMPANY,

17 Plaintiff,

18 v.

19 UNITED NATIONAL INSURANCE
20 COMPANY and DOES 1 through 10:

21 Defendants.

22 UNITED NATIONAL INSURANCE
23 COMPANY, a Pennsylvania corporation,

24 Cross-complainant,

25 v.

26 FIREMAN'S FUND INSURANCE
27 COMPANY, a California corporation,
28 INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation, and
Roes 1 through 10, inclusive,

Cross-defendants.

Action No.: C 07-04943 JL

AMENDED ANSWER AND
COUNTERCLAIM OF UNITED NATIONAL
INSURANCE COMPANY.

DEMAND FOR JURY TRIAL.

ANSWER TO COMPLAINT

Defendant United National Insurance Company, in answer to the complaint filed by plaintiff Fireman's Fund Insurance Company, admits, denies, and alleges as follows:

1. Responding to the allegations in paragraph 1 of the complaint, United National admits and alleges that plaintiff makes the contentions set forth in paragraph 1 of the complaint. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 1 of the complaint.

2. Responding to the allegations in paragraph 2 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

3. Responding to the allegations in paragraph 3 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 3 of the complaint.

4. Responding to the allegations contained in paragraph 4 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

5. Responding to the allegations in paragraph 5 of the complaint, United National admits and alleges that it is a Pennsylvania corporation and that it is authorized to and sells insurance policies on a surplus-lines basis in the State of California. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 5 of the complaint.

6. Responding to the allegations in paragraph 6 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 6 of the complaint.

7. Responding to the allegations contained in paragraph 7 of the complaint, United National admits and alleges that it issued to named insured Cirrus Medical Staffing LLC, a policy of claims-made-and-reported professional liability insurance effective from January 27, 2006, to

1 January 26, 2007, with policy number AH-0000267 (the "United National policy") and that the
2 United National policy sets forth to various terms, conditions, exclusions, and dollar limits of
3 liability, all of which speak for themselves. Except as so admitted and alleged, United National
4 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
5 every, and all of the allegations contained in paragraph 7 of the complaint.

6 8. Responding to the allegations in paragraph 8 of the complaint, United National is
7 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*
8 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in
9 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number
10 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted
11 and alleged, United National lacks sufficient knowledge, information or belief to respond to and
12 on that basis denies each, every, and all of the allegations contained in paragraph 8 of the
13 complaint.

14 9. Responding to the allegations in paragraph 9 of the complaint, United National is
15 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*
16 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in
17 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number
18 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted
19 and alleged, United National lacks sufficient knowledge, information or belief to respond to and
20 on that basis denies each, every, and all of the allegations contained in paragraph 9 of the
21 complaint.

22 10. Responding to the allegations in paragraph 10 of the complaint, United National is
23 informed and believes and on that basis admits and alleges that a lawsuit styled *Tracy v. Lovelace*
24 *Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in the State of
25 New Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005
26 07009, the documents of which speak for themselves. Except as so admitted and alleged, United
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
28 each, every, and all of the allegations contained in paragraph 10 of the complaint.

1 11. Responding to the allegations in paragraph 11 of the complaint, United National is
2 informed and believes, and on that basis admits and alleges, that Interstate Fire & Casualty
3 Company defended Cirrus Medical Services LLC in the *Tracy* action. Except as so admitted and
4 alleged, United National lacks sufficient knowledge, information or belief to respond to and on
5 that basis denies each, every, and all of the allegations contained in paragraph 11 of the
6 complaint.

7 12. Responding to the allegations in paragraph 12 of the complaint, United National
8 admits and alleges that it received notice of the *Tracy* action and that United National issued a
9 letter dated October 6, 2006, which speaks for itself, advising that United National would not
10 defend Cirrus in the *Tracy* action, and reserving United National's rights to disclaim coverage for
11 the *Tracy* action under the United National policy. Except as so admitted and alleged, United
12 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
13 each, every, and all of the allegations contained in paragraph 12 of the complaint.

14 13. Responding to the allegations in paragraph 13 of the complaint, United National
15 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
16 every, and all of the allegations contained in paragraph 13 of the complaint.

17 14. Responding to the allegations in paragraph 14 of the complaint, United National
18 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself, advising
19 that United National had determined that there was no coverage under the United National policy
20 for the *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a
21 claim first made and reported during Interstate Fire & Casualty Company's immediately
22 preceding policy period, and stating that United National continued to reserve all of its rights
23 under the policy. Except as so admitted and alleged, United National lacks sufficient knowledge,
24 information or belief to respond to and on that basis denies each, every, and all of the allegations
25 contained in paragraph 14 of the complaint.

26 15. Responding to the allegations contained in paragraph 15 of the complaint, United
27 National lacks sufficient knowledge, information or belief to respond and on that basis denies
28 each, every, and all of the allegations contained in paragraph 15 of the complaint.

1 16. Responding to the allegations in paragraph 16 of the complaint, United National
2 admits and alleges that the United National policy includes, without the added italics, the policy
3 language quoted in paragraph 16. Except as so admitted and alleged, United National lacks
4 sufficient knowledge, information or belief to respond to and on that basis denies each, every, and
5 all of the allegations contained in paragraph 16 of the complaint.

6 17. Responding to the allegations in paragraph 17 of the complaint, United National
7 denies each, every, and all of the allegations contained in paragraph 17 of the complaint.

8 18. Responding to the allegations in paragraph 18 of the complaint, United National
9 admits and alleges that the United National policy speaks for itself. Except as so admitted and
10 alleged, United National lacks sufficient knowledge, information or belief to respond to and on
11 that basis denies each, every, and all of the allegations contained in paragraph 18 of the
12 complaint.

13 19. Responding to the allegations in paragraph 19 of the complaint, United National
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
15 and all of the allegations contained in paragraph 19 of the complaint.

16 20. Responding to the allegations in paragraph 20 of the complaint, United National
17 admits and alleges that the United National policy, which speaks for itself, includes the policy
18 language quoted in paragraph 20, although the quoted language is set forth in a larger paragraph
19 that has been omitted from paragraph 20. Except as so admitted and alleged, United National
20 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
21 every, and all of the allegations contained in paragraph 20 of the complaint.

22 21. Responding to the allegations in paragraph 21 of the complaint, United National
23 admits and alleges that the United National policy, which speaks for itself, includes the policy
24 language quoted in paragraph 21, although the quoted language is set forth in a larger paragraph
25 that has been omitted from paragraph 21. Except as so admitted and alleged, United National
26 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,
27 every, and all of the allegations contained in paragraph 21 of the complaint.

28 22. Responding to the allegations in paragraph 22 of the complaint, United National

1 admits and alleges that the United National policy speaks for itself. Except as so admitted and
2 alleged, United National denies each, every, and all of the allegations contained in paragraph 22
3 of the complaint.

4 23. Responding to the allegations in paragraph 23 of the complaint, United National
5 denies each, every, and all of the allegations contained in paragraph 23 of the complaint.

6 24. Responding to the allegations in paragraph 24 of the complaint, United National
7 denies each, every, and all of the allegations contained in paragraph 24 of the complaint.

8 25. Responding to the allegations in paragraph 25 of the complaint, United National
9 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
10 and all of the allegations contained in paragraph 25 of the complaint.

11 26. Responding to the allegations in paragraph 26 of the complaint, United National
12 admits and alleges that it contributed \$100,000 on behalf of Cirrus to settle the *Tracy* action.
13 Except as so admitted and alleged, United National lacks sufficient knowledge, information or
14 belief to respond and on that basis denies each, every, and all of the allegations contained in
15 paragraph 26 of the complaint.

16 27. Responding to the allegations in paragraph 27 of the complaint, United National
17 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
18 and all of the allegations contained in paragraph 27 of the complaint.

19 28. Responding to the allegations in paragraph 28 of the complaint, United National
20 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

21 29. Responding to the allegations in paragraph 29 of the complaint, United National
22 admits and alleges that Fireman's Fund contends that United National had a duty to defend
23 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse
24 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United
25 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United
26 National contends that it has no obligation to reimburse Fireman's Fund of Interstate for any of
27 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United
28 National lacks sufficient knowledge, information or belief to respond to and on that basis denies

1 each, every, and all of the allegations contained in paragraph 29 of the complaint.

2 30. Responding to the allegations in paragraph 30 of the complaint, United National
3 admits and alleges that Fireman's Fund contends that United National had a duty to defend
4 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse
5 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United
6 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United
7 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of
8 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United
9 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
10 each, every, and all of the allegations contained in paragraph 30 of the complaint.

11 31. Responding to the allegations in paragraph 31 of the complaint, United National
12 admits and alleges that Fireman's Fund contends that United National had a duty to defend
13 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse
14 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United
15 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United
16 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of
17 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United
18 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
19 each, every, and all of the allegations contained in paragraph 31 of the complaint.

20 32. Responding to the allegations in paragraph 32 of the complaint, United National
21 admits and alleges that Fireman's Fund contends that United National had a duty to defend
22 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse
23 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United
24 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United
25 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of
26 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
28 each, every, and all of the allegations contained in paragraph 32 of the complaint.

1 33. Responding to the allegations in paragraph 33 of the complaint, United National
2 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

3 34. Responding to the allegations in paragraph 34 of the complaint, United National
4 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
5 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
6 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
7 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
8 the *Tracy* action, and that United National contends that it has no obligation to reimburse
9 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to
10 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
11 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
12 each, every, and all of the allegations contained in paragraph 34 of the complaint.

13 35. Responding to the allegations in paragraph 35 of the complaint, United National
14 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
15 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
16 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
17 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
18 the *Tracy* action, and that United National contends that it has no obligation to reimburse
19 Fireman's Fund or Interstate for all or part of any payment by Fireman's' Fund or Interstate to
20 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
21 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
22 each, every, and all of the allegations contained in paragraph 35 of the complaint.

23 36. Responding to the allegations in paragraph 36 of the complaint, United National
24 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
25 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
26 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
27 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
28 the *Tracy* action, and that United National contends that it has no obligation to reimburse

1 Fireman's Fund or Interstate for all or part of any payment by Fireman's' Fund or Interstate to
2 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
3 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
4 each, every, and all of the allegations contained in paragraph 36 of the complaint.

5 37. Responding to the allegations in paragraph 37 of the complaint, United National
6 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify
7 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National
8 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense
9 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in
10 the *Tracy* action, and that United National contends that it has no obligation to reimburse
11 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to
12 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United
13 National lacks sufficient knowledge, information or belief to respond to and on that basis denies
14 each, every, and all of the allegations contained in paragraph 37 of the complaint.

15 38. Responding to the allegations in paragraph 38 of the complaint, United National
16 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

17 39. Responding to the allegations in paragraph 39 of the complaint, United National
18 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
19 and all of the allegations contained in paragraph 39 of the complaint.

20 40. Responding to the allegations in paragraph 40 of the complaint, United National
21 admits and alleges that it issued to Cirrus as named insured a policy of claims-made-and-reported
22 professional liability insurance referenced in paragraph 7 of this answer. Except as so admitted
23 and alleged, United National lacks sufficient knowledge, information or belief to respond to and
24 on that basis denies each, every, and all of the allegations contained in paragraph 40 of the
25 complaint.

26 41. Responding to the allegations in paragraph 41 of the complaint, United National
27 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,
28 advising that United National had determined that there was no coverage under the Untied

1 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to
2 constitute a claim first made and reported during Interstate Fire & Casualty Company's
3 immediately preceding policy period, and stating that United National continued to reserve all
4 of its rights under the policy. Except as so admitted and alleged, United National lacks
5 sufficient knowledge, information or belief to respond to and on that basis denies each, every,
6 and all of the allegations contained in paragraph 41 of the complaint.

7 42. Responding to the allegations in paragraph 42 of the complaint, United National
8 denies each, every, and all of the allegations contained in paragraph 42 of the complaint.

9 43. Responding to the allegations in paragraph 43 of the complaint, United National
10 denies each, every, and all of the allegations contained in paragraph 43 of the complaint.

11 44. Responding to the allegations in paragraph 44 of the complaint, United National
12 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

13 45. Responding to the allegations in paragraph 45 of the complaint, United National
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each,
15 every, and all of the allegations contained in paragraph 45 of the complaint.

16 46. Responding to the allegations contained in paragraph 46 of the complaint, United
17 National admits and alleges that it issued to Cirrus as named insured a policy of claims-made-
18 and-reported professional liability insurance referenced in paragraph 7 of this answer. Except as
19 so admitted and alleged, United National lacks sufficient knowledge, information or belief to
20 respond to and on that basis denies each, every, and all of the allegations contained in paragraph
21 46 of the complaint.

22 47. Responding to the allegations in paragraph 47 of the complaint, United National
23 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,
24 advising that United National had determined that there was no coverage under the United
25 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to
26 constitute a claim first made and reported during Interstate Fire & Casualty Company's
27 immediately preceding policy period, and stating that United National continued to reserve all
28 of its rights under the policy. Except as so admitted and alleged, United National lacks

1 sufficient knowledge, information or belief to respond to and on that basis denies each, every,
2 and all of the allegations contained in paragraph 47 of the complaint.

3 48. Responding to the allegations in paragraph 48 of the complaint, United National
4 denies each, every, and all of the allegations contained in paragraph 48 of the complaint.

5 49. Responding to the allegations in paragraph 49 of the complaint, United National
6 denies each, every, and all of the allegations contained in paragraph 49 of the complaint.

7 50. Responding to the allegations in paragraph 50 of the complaint, United National
8 admits and alleges that plaintiff makes the contentions set forth in paragraph 50 of the complaint.
9 Except as so admitted, United National lacks sufficient knowledge, information or belief to
10 respond and on that basis denies each, every, and all of the allegations contained in paragraph 50
11 of the complaint.

12 51. Responding to the allegations in paragraph 51 of the complaint, United National
13 incorporates by reference paragraphs 1 through 28 of this answer as though fully set forth here.

14 52. Responding to the allegations in paragraph 52 of the complaint, United National
15 admits and alleges that plaintiff makes the contentions set forth in paragraph 52 of the complaint.
16 Except as so admitted, United National lacks sufficient knowledge, information or belief to
17 respond and on that basis denies each, every, and all of the allegations contained in paragraph 52
18 of the complaint.

19 53. Responding to the allegations in paragraph 53 of the complaint, United National
20 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
21 and all of the allegations contained in paragraph 53 of the complaint.

22 54. Responding to the allegations in paragraph 54 of the complaint, United National
23 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
24 and all of the allegations contained in paragraph 54 of the complaint.

25 55. Responding to the allegations in paragraph 55 of the complaint, United National
26 admits and alleges that it issued a letter dated October 6, 2006, which speaks for itself, advising
27 that United National would not defend Cirrus in the *Tracy* action, and reserving United
28 National's rights to disclaim coverage for the *Tracy* action. United National further admits and

1 alleges that it issued a letter dated February 13, 2007, which speaks for itself, advising that United
2 National had determined that there was no coverage under the United National policy for the
3 *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a claim first
4 made and reported during Interstate Fire & Casualty Company's immediately preceding policy
5 period, and stating that United National continued to reserve all of its rights under the policy.
6 Except as so admitted, United National lacks sufficient knowledge, information or belief to
7 respond and on that basis denies each, every, and all of the allegations contained in paragraph 55
8 of the complaint.

9 56. Responding to the allegations in paragraph 56 of the complaint, United National
10 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,
11 and all of the allegations contained in paragraph 56 of the complaint.

12
13 United National further alleges the following affirmative defenses:

14 1. As and for a first, separate defense, United National alleges that the complaint and
15 each claim therein do not state facts sufficient to constitute a cause of action against United
16 National.

17 2. As and for a second, separate defense, United National alleges that the plaintiff
18 lacks standing to bring this action.

19 3. As and for a third, separate defense, United National alleges that the complaint and
20 each cause of action in it are barred by the terms, provisions, conditions, limitations, and
21 exclusions of the alleged United National policy. United National reserves the right to amend its
22 answer to the Complaint to assert any additional defenses arising from the terms of the alleged
23 United National insurance policy, and/or applicable insurance policy terms, provisions,
24 conditions, limitations, and exclusions as may become apparent during the continuing course of
25 discovery in this action.

26 4. As and for a fourth, separate defense, United National alleges that the complaint
27 and each cause of action in it are barred by the terms, provisions, conditions, limitations, and
28 exclusions of a policy of liability insurance issued by Interstate Fire & Casualty Company, policy

number ASC-1000204, to named insured Cirrus Medical Staffing, LLC, for the policy period January 27, 2005, to January 27, 2006. United National reserves the right to amend its answer to the Complaint to assert any additional defenses arising from the terms of the alleged Interstate insurance policy, and/or applicable insurance policy terms, provisions, conditions, limitations, and exclusions as may become apparent during the continuing course of discovery in this action.

Wherefore United National prays for judgment as follows:

1. That the Court deny plaintiff's prayers for judicial declarations set forth in the complaint;
2. That plaintiff take nothing by its complaint;
3. That United National be awarded its costs of suit incurred herein;
4. That United National be awarded its attorneys fees;
3. For such other and further relief as the Court deems just and proper.

**COUNTERCLAIM AGAINST FIREMANS' FUND INSURANCE COMPANY,
INTERSTATE FIRE & CASUALTY COMPANY, AND ROES 1 THROUGH 10**

Counterclaimant United National Insurance Company, for its counterclaim against counterdefendants Fireman's Fund Insurance Company, Interstate Fire & Casualty Company, and Roes 1 through 10, inclusive, alleges as follows:

GENERAL ALLEGATIONS

1. At all times herein mentioned, United National was and is a Pennsylvania corporation with its principal place of business in Bala Cynwyd, Pennsylvania.
2. United National is informed and believes and thereon alleges that counterdefendant Fireman's Fund Insurance Company is a California corporation with its principal place of business in Novato, California.

1 3. United National is informed and believes and thereon alleges that
2 counterdefendant Interstate Fire & Casualty Company is an Illinois corporation, doing business in
3 California, with its principal place of business in Chicago, Illinois.

4 4. United National is unable to ascertain the true names and identities of those
5 counterdefendants designated as Roes 1 through 10, inclusive. United National will ask leave of
6 Court to amend this complaint and all subsequent pleadings to insert the true names and
7 capacities of these fictitiously named counterdefendants when ascertained. The allegations and
8 controversies alleged below with respect to the named counterdefendants Fireman's Fund and
9 Interstate apply equally to Roes 1 through 10.

10 5. Jurisdiction over United National's counterclaim is conferred by 28 U.S.C. §
11 1367(a).

12 6. Venue is proper in this Court under 28 U.S.C. § 1391(a)(1), because
13 counterdefendant Fireman's Fund is a resident of this district.

14 7. United National is informed and believes, and on that basis alleges, that Cirrus
15 Medical Staffing LLC was sued in underlying litigation styled *Tracy v. Lovelace Sandia Health*
16 *Services dba Albuquerque Regional Medical Center et al.*, which was filed in the State of New
17 Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005 07009.
18 United National is informed and believes, and on that basis alleges, that the *Tracy* action was a
19 medical-malpractice action that was filed on or about September 14, 2005.

20 8. United National is informed and believes, and on that basis alleges, that the
21 complaint in the *Tracy* action alleges, at paragraph 6, that Cathy Robinson R.N., "negligently
22 failed to monitor Marilyn Tracy's fluid status, negligently failed to respond to worsening vital
23 signs and negligently failed to appropriately notify the physician on call that Marilyn Tracy's
24 status was not improving. In addition, the nurses negligently failed to continue to monitor
25 Marilyn Tracy, despite her worsening condition, such that she was allowed to deteriorate, become
26 unresponsive, apneic, go into asystole and code." United National is informed and believes, and
27 on that basis alleges, that the complaint in the *Tracy* action alleges that Marilyn Tracy was
28 pronounced dead on October 7, 2004.

1 9. United National is informed and believes, and on that basis alleges, that on
2 January 4, 2006, attorney Ellen Thorne Skrak, counsel for defendant Lovelace Sandia in the
3 *Tracy* action, faxed a letter to Cirrus stating that plaintiff's counsel in the *Tracy* action "has
4 expressed the intention to bring you into the case." United National is informed and believes, and
5 on that basis alleges, that Skrak's letter also stated, "[y]our nurse, Cathy Robinson, was one of the
6 nurses who cared for Mrs. Tracy prior to her death." United National is informed and believes,
7 and on that basis alleges, that Skrak forwarded a copy of the complaint in the *Tracy* action to
8 Greg Allen of Cirrus on January 5, 2006.

9 10. United National is informed and believes, and on that basis alleges, that Cirrus
10 notified Robert P. Watson of the Watson Insurance Agency, Inc., about Skrak's letter, and that
11 Watson, on January 5, 2006, prepared a "General Liability Notice of Occurrence/Claim" form
12 listing Interstate policy number ASC1000204, a notice-of-claim date of January 4, 2006, and
13 stating "See attached letter received by insured regarding medical malpractice issue." United
14 National is informed and believes, and on that basis alleges, that Terry Bellotti of Health Care
15 Insurers sent an e-mail to Interstate on January 6, 2006, stating "please see attached notice of
16 claim and letter from a lawyer office."

17 11. United National is informed and believes, and on that basis alleges, that on
18 January 10, 2006, Skrak sent a fax to Jennifer Beran of Interstate forwarding a copy of the
19 complaint in the *Tracy* action.

20 12. United National is informed and believes, and on that basis alleges, that the first-
21 amended complaint in the *Tracy* action alleges, at paragraph 3, that Cirrus employee Cathy
22 Robinson was a "healthcare provider[] who treated Marilyn Tracy," the decedent whose death
23 was the subject of the *Tracy* action. United National is informed and believes, and on that basis
24 alleges, that the first amended complaint further alleges, at paragraph 28, that Cirrus "acting
25 through its employee, agent and/or apparent agent or contractor, Cathy Robinson, RN, negligently
26 failed to inform the physician on call of Marilyn Tracy's status," as a result of which, according
27 to paragraph 23, Marilyn Tracy was pronounced dead on October 7, 2004.

28 13. United National is informed and believes, and on that basis alleges, that N.M. Stat.

1 Ann. § 41-5-15 provides as follows:

2
3 A. No malpractice action may be filed in any court against a qualifying health
4 care provider before application is made to the medical review commission
5 and its decision is rendered.

6
7 B This application shall contain the following:

8
9 (1) a brief statement of the facts of the case, naming the persons
10 involved, the dates and the circumstances, so far as they are known,
11 of the alleged act or acts of malpractice; and

12
13 (2) a statement authorizing the panel to obtain access to all medical and
14 hospital records and information pertaining to the matter giving rise
15 to the application, and, for the purposes of is consideration of the
16 matter only, waiving any claim of privilege as to the contents of
17 those records. Nothing in that statement shall in any way be
18 construed as waiving that privilege for any other purpose or in any
19 other context, in or out of court.

20
21 14. United National is informed and believes, and on that basis alleges, that N.M. Stat.
22 Ann. § 41-5-16 provides as follows:

23
24 A. Upon receipt of an application for review, the commission's director or his
25 delegate shall cause to be served a true copy of the application on the
26 health care providers involved. Service shall be effected pursuant to New
27 Mexico law. If the health care provider involved chooses to retain legal
28 counsel, his attorney shall informally enter his appearance with the

1 director.

2
3 B The health care provider shall answer the application for review and in
4 addition shall submit a statement authorizing the panel to obtain access to
5 all medical and hospital records and information pertaining to the matter
6 giving rise to the application, and, for the purposes of its consideration of
7 the matter only, waiving any claim of privilege as to the contents of those
8 records. Nothing in that statement shall in any way be construed as
9 waiving that privilege for any other purpose or in any other context, in or
10 out of court.

11
12 C. In instances where applications are received employing the theory of
13 respondeat superior or some other derivative theory of recovery, the
14 director shall forward such applications to the state professional societies,
15 associations or licensing boards of both the individual health care provider
16 whose alleged malpractice caused the application to be filed, and the health
17 care provider named a respondent as employer, master or principal.

18
19 15. United National is informed and believes, and on that basis alleges, that Interstate
20 and Roes 1 through 10 issued to Cirrus as named insured a policy of liability insurance, number
21 ASC-10000204, effective for the policy period January 27, 2005, to January 27, 2006. United
22 National is informed and believes, and on that basis alleges, that the Interstate policy generally
23 provides liability coverage to Cirrus on a claims-made-and-reported basis subject to limits of
24 \$1,000,000 for each incident and \$3,000,000 in the aggregate.

25 16. United National is informed and believes, and on that basis alleges, that the
26 Interstate policy sets forth the following language in Form 01-PL-4002 (03/04):

27 I. COVERAGE.

28 The Company will pay on behalf of the Insured all sums which the

Insured shall become legally obligated to pay as **Damages** for **Claims** first made against the Insured and reported to the Company during the **Policy Period**, as a result of **Bodily Injury, Property Damages** or **Personal Injury** caused by an **incident**, provided always that such **incident** happens:

A. on or after the policy effective date shown on the Declarations; or

B. at any time prior to the policy effective date shown on the Declarations if;

1. such **incident** happens on or subsequent to the "prior acts date" on the Declarations, and

2. no **insured** knew or could have reasonably foreseen that such **incident** might be expected to be the basis of a **Claim** or **Suit** on the effective date of this policy.

The Company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as **Damages** to which this insurance applies and the Company shall have the right and duty to defend any **Suit** against the **Insured** seeking **Damages** on account of such **Bodily Injury, Property Damage** or **Personal Injury**, even if any of the allegations of the **Suit** are groundless, false or fraudulent, but the Company shall not be obligated to pay any **Claims** or **Claims Expenses** or judgments or continue to defend any **Suit** after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

* * *

VI. WHEN **CLAIM** IS CONSIDERED AS FIRST MADE

A **Claim** shall be considered as being first made when the Company first receives written notice from the **Insured** advising that a **Claim** has been made and providing the details of the **Claim**.

1 All **Claims** arising out of the same or related **incident** shall be considered
 2 as having been made at the item the first such **Claim** is made, and shall be
 3 subject to the same limit of liability and only a single deductible, if any,
 4 shall apply.

5 * * *

6 IX. DEFINITIONS

7 When used in this policy (including endorsement forming a part hereof):

8
 9 **"Bodily Injury"** means bodily injury, sickness or disease, mental anguish,
 10 psychological injury or emotional distress sustained by any person,
 11 including death at any time resulting therefrom;

12
 13 **"Claim"** means a demand for money or the filing of **Suit** naming the
 14 **Insured** and, in either case, alleging a **Bodily Injury, Property Damage**
 15 **or Personal Injury** as a result of an **Incident**.

16 * * *

17 **"Damages"** means compensatory judgments, settlement or awards but
 18 does not include punitive or exemplary **Damages**, fines or penalties, the
 19 return of fees or other consideration paid to the **insured**, or the portion of
 20 any award or judgment caused by the multiplication of actual **Damages**
 21 under federal or state law. However, if a **Suit** is brought against the
 22 **Insured** with respect to a **Claim** for alleged acts or omissions falling
 23 within the scope of coverage afforded by this insurance seeking both
 24 compensatory and punitive or exemplary **Damages**, then the Company will
 25 afford a defense to such action, without liability however, for payment of
 26 such punitive or exemplary damages;

27 * * *

28 **"Incident"** means any act or omission in the rendering of or failure to

render services by the **Insured**, or by any person for whom the **Insured** is legally responsible, in the conduct of the business or professional occupation specified in the Declarations.

Any such act or omission together with all related acts or omissions shall be considered one "**Incident**" and be subject to the same limit of liability;

* * *

"**Suit**" means a civil proceeding in which **Damages** because of **Bodily Injury, Property Damage or Personal Injury** to which this insurance applies are alleged. "**Suit**" includes:

- A. an arbitration proceeding in which such **Damages** are claimed and to which the **insured** must submit or does submit with the Company's consent; or
- B. any other alternative dispute resolution proceeding in which such **Damages** are claimed and to which the **Insured** submits with the Company's consent.

17. United National issued to Cirrus as named insured a claims-made-and-reported professional liability insurance policy effective from January 27, 2006, to January 26, 2007, with policy number AH-0000267 (the "United National policy")

18. The United National policy states as follows:

[From Form CPA-119(2.2005):]

SECTION I—PROFESSIONAL LIABILITY COVERAGE

1. Insuring Agreement

We will pay those sums that the insured becomes legally obligated to pay as "compensatory damages" as a result of a "wrongful act." This insurance applies to injury only if a "claim" for damages to which no other insurance applies, because of the injury is first made against the insured and reported to us during the "policy period." This insurance does not apply to injury caused by a "wrongful act" that takes place outside of the "covered

territory” or was committed before the Retroactive Date shown in the
Declarations or after the “policy period.”

- a. A “claim” by a person or organization seeking damages will be
deemed to have been made when notice of such “claim” is received
and recorded by the insured or by us, which ever comes first;

* * *

- c. We will have the right and duty to select counsel and to defend any
“suit” seeking damages. However, we will have no duty to defend
the insured against any “suit” seeking damages for injury to which
this insurance does not apply

* * *

2. Exclusions

This insurance does not apply to:

* * *

- s. Any “claim,” “suit,” or “wrongful act” that might result in a
“claim” or “suit,” of which any insured had knowledge or could
have reasonably foreseen, at the signing date of the application for
this insurance.

* * *

SECTION V—PROFESSIONAL LIABILITY CONDITIONS

* * *

4. Other Insurance

If other valid and collectible insurance with any other insurer is available to
the insured covering a “claim” also covered hereunder (except insurance
purchased to apply in excess of the limit of liability hereunder), this
insurance will be excess of, and not contribute with, such insurance. If the
insured has other coverage with us covered a “claim” also covered by this
policy or coverage Part, the insured must elect which policy or Coverage

Part will apply and we will be liable under the Coverage Part so elected and will not be liable under any other policy or Coverage Part.

* * *

5. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations and application, made part of this policy, are accurate and complete;
- b. Those statements are based upon representations you made to us;
- c. We have issued this policy in reliance upon your representations; and
- d. This policy embodies all of the agreements existing between you and us or any of our agents relating to this insurance.

* * *

SECTION VI—DEFINITIONS

* * *

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Claim" means a written demand upon the insured for "compensatory damages," including, but not limited to, the service of "suit" or institution of arbitration proceedings against the insured. "Claim" includes reports of accidents, acts, errors, occurrences, offenses or omissions which may give rise to a "claim" under this policy. "Claims" based on or arising out of the same act or interrelated acts of one or more insured will be considered to be based on a single "wrongful act."

* * *

11. "Suit" means a civil proceeding in which damages for injury to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages to which you must submit or submit with our

1 consent.

- 2 12. "Wrongful act" means any act, error or omission in the furnishing of
3 professional social services. It includes the furnishing of food, beverages,
4 medications or appliances in connection with those services. All
5 "wrongful acts" committed in the furnishing of professional social services
6 to any one person will be considered one "wrongful act." All interrelated
7 "wrongful acts" of one or more insured will be considered one "wrongful
8 act."

9
10 [From Form EPA-909 (5/2006):]

11 This endorsement modifies insurance provided under the following:

12 PROFESSIONAL LIABILITY COVERAGE PART

13 Paragraph 12. of SECTION VI.—DEFINITIONS is deleted and replaced by the
14 following:

- 15 12. "Wrongful act" means:

- 16 a. any act or omission in the furnishing of healthcare services
17 to a patient or client including the furnishing of food,
18 beverages, medications, medical treatment or appliances in
19 connection with such services and the postmortem handling
20 of human bodies.
21 b. All "wrongful acts" committed in the furnishing of services
22 to any one patient or client will be considered one
23 "wrongful act." All interrelated "wrongful acts" of one or
24 more insured will be considered one "wrongful act."

25
26 19. United National is informed and believes, and on that basis alleges, that Interstate
27 and/or Fireman's Fund agreed to defend and indemnify Cirrus in connection with the *Tracy*
28 pursuant to the terms and provisions of the Interstate policy.

1 FIRST CLAIM FOR DECLARATORY JUDGMENT—DUTY TO DEFEND

2 20. United National incorporates by reference the allegations of paragraphs 1-15 of
3 this counterclaim.

4 21. An actual controversy has arisen and now exists between United National,
5 Fireman's Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties
6 under the Interstate and United National policies regarding the underlying *Tracy* action. United
7 National contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were
8 required to defend Cirrus in connection with the *Tracy* action, and that United National had no
9 obligation to defend Cirrus in connection with the *Tracy* action. On the other hand, United
10 National is informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and
11 Roes 1 through 10, contend that they had no obligation to defend Cirrus in the *Tracy* action and
12 that United National alone was obligated to defend Cirrus in the *Tracy* action, or, alternately, that
13 Fireman's Fund, Interstate, and United National were jointly obligated to defend Cirrus in
14 connection with the *Tracy* action. United National requests this Court to make and enter its
15 binding judicial declarations in accordance with United National's contentions set forth in this
16 paragraph. The requested declarations are both necessary and proper at this time under the
17 circumstances in that the interest of judicial economy and substantial justice will be served
18 thereby.

19
20 SECOND CLAIM FOR DECLARATORY JUDGMENT—DUTY TO INDEMNIFY

21 22. United National incorporates by reference the allegations of paragraphs 1-15 of
22 this counterclaim

23 23. An actual controversy has arisen and now exists between United National, Fireman's
24 Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties under the
25 Interstate and United National policies regarding the underlying *Tracy* action. United National
26 contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were required to
27 indemnify Cirrus in connection with the *Tracy* action, and that United National had no obligation
28 to indemnify Cirrus in connection with the *Tracy* action. On the other hand, United National is

1 informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and Roes 1
2 through 10, contend that they had no obligation to indemnify Cirrus in the *Tracy* action and that
3 United National alone was obligated to indemnify Cirrus in the *Tracy* action, or, alternately, that
4 Fireman's Fund, Interstate, and United National were jointly obligated to indemnify Cirrus in
5 connection with the *Tracy* action. United National requests this Court to make and enter its
6 binding judicial declarations in accordance with United National's contentions set forth in this
7 paragraph. The requested declarations are both necessary and proper at this time under the
8 circumstances in that the interest of judicial economy and substantial justice will be served
9 thereby.

10 24. If the Court enters a judicial declaration in accordance with United National's
11 contentions set forth in the preceding paragraph, United National is entitled to recover from
12 defendants Fireman's Fund, Interstate, and Roes 1 through 10, or any of them, \$100,000, plus
13 prejudgment interest under Cal. Civ. Code §§ 3287(a) and 3289(b), to reimburse United National
14 for its contribution toward the settlement of the *Tracy* action.

15
16 WHEREFORE, United National prays for judgment as follows:

- 17 a. That the Court make and enter a binding judicial declaration of the parties'
18 respective rights and duties in accordance with United National's contentions set
19 forth in paragraph 17 above,
- 20 b. That the Court make and enter a binding judicial declaration of the parties'
21 respective rights and duties in accordance with United National's contentions set
22 forth in paragraph 19 above,
- 23 c. That the Court order and enter a money judgment requiring counterdefendants
24 Fireman's Fund, Interstate, Roes 1 through 10, and any of the them, to reimburse
25 United National \$100,000, plus prejudgment interest under Cal. Civ. Code
26 §§3287(a) and 3289(b), for the money it contributed to settlement of the *Tracy*
27 action.
- 28 d. That United National be awarded its costs of suit incurred herein; and

1 e. For such other and further relief as the Court deems just and proper.

2
3 Respectfully submitted,

4 NIELSEN, HALEY & ABBOTT LLP

5
6 Dated: June 5, 2008

By: 

Thomas H. Nienow

Attorneys for Defendant and Counterclaimant

UNITED NATIONAL INSURANCE COMPANY

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12 **DEMAND FOR JURY TRIAL**

13 Defendant and counterclaimant United National Insurance Company demands trial by jury in
14 this action.

15 Respectfully submitted,

16 NIELSEN, HALEY & ABBOTT LLP

17
18 Dated: June 5, 2008

By: 

Thomas H. Nienow

Attorneys for Defendant and Counterclaimant

UNITED NATIONAL INSURANCE COMPANY

Interstate Fire & Casualty Company v. United National Ins. Co.
United State District Court, Northern District Court No.: C 07-04943 MHP

PROOF OF SERVICE

I declare that:

I am a citizen of the United States, employed in the County of San Francisco. I am over the age of eighteen years, and not a party to the within cause. My business address is 44 Montgomery Street, Suite 750, San Francisco, California 94104. On the date set forth below I served the following document(s) described as:

DECLARATION OF THOMAS H. NIENOW IN SUPPORT OF UNITED NATIONAL'S MOTION FOR LEAVE TO AMEND COUNTERCLAIM

☐ (BY FACSIMILE) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date.

☐ (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Francisco, California.

☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand this date to the offices of the addressee(s).

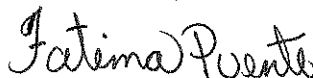
☐ (BY OVERNIGHT DELIVERY) I caused such envelope(s) to be delivered to an overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it is to be served.

☒ (BY ELECTRONIC SERVICE) by submitting an electronic version of the document(s) to be served on all parties listed on the service list on file with the court as of this date.

Attorney for Plaintiff, Fireman's Fund Ins. Co.

Christopher J. Borders
Casey A. Hatton
Hinshaw & Culbertson LLP
One California Street, 18th Floor
San Francisco, CA 94111
Tel: (415) 362-6000
Fax: (415) 834-9070

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 20, 2008, at San Francisco, California.



Fatima Puente